75-1064

In the Supreme Court of the United States

Supreme Court, U. S.
FILED
JAN 27 1976
MICHAEL RODAK, JR., CLERK

No. A—

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,

Appellants

v.

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND; Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,

Appellees

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania

APPENDIX TO JURISDICTIONAL STATEMENT

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COMPLAINT—NOVEMBER 16, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Kevin Bartley; Steve Gentile; Leslie Levine; Vicki Mathews; Mark Weand, minors, through their next friend, individually and on behalf of all others similarly situated,

Plaintiffs

v.

Haverford State Hospital; Jack B. Kremens, individually and as Hospital Director of Haverford State Hospital; Helene Wohlgemuth, individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; William B. Beach, Jr., individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,

Defendants

COMPLAINT—CLASS ACTION

I.
PRELIMINARY STATEMENT

1. Plaintiffs, individually and on behalf of all others similarly situated, seek declaratory and injunctive relief, and damages, for violations of their civil

rights resulting from the operation of certain parts of the Pennsylvania Mental Health and Mental Retardation Act of 1966 which permit the involuntary commitment of persons eighteen years of age or under to mental health facilities on a different basis than other persons and without notice, hearing, right to counsel and other procedural safeguards. The convening of a three judge court is also sought. The statutes are challenged on the grounds that they conflict with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

II.
JURISDICTION

2. Jurisdiction is conferred upon this court by 28 U.S.C. § 1331 which provides for original federal question jurisdiction. The amount in controversy, exclusive of interest and costs, is greater than $10,000.

3. Jurisdiction is conferred upon this court by 28 U.S.C. § 1343(3) which provides for original jurisdiction in all suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States and by federal law. Defendants here act under color of law.

4. Plaintiffs' action for declaratory and injunctive relief, and for damages, is authorized by:

a. 28 U.S.C. 2201, 2202, 2281 and 2284, and by Rules 57 and 65 of the Federal Rules of Civil Procedure, which relate to declaratory judgments, injunctions and three judge courts.

b. 42 U.S.C. §§ 1983 and 1988, which relate to civil rights actions.

III.
THREE-JUDGE COURT

5. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 since Plaintiffs seek an injunction to restrain Defendants, a state institution and state officers, from the enforcement, execution and operation of portions of state statutes (50 P.S. §§ 4402(a)(1), 4402(a)(2), 4402(c), 4403(a)(1), 4403(a)(2) and 4403(c)) of state-wide applicability on the ground that said statutes are contrary to the United States Constitution.

IV.
CLASS ACTION

6. The named Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(a), 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all others similarly situated.

7. The members of the class of Plaintiffs similarly situated are all persons under eighteen years of age who have been, are, or may be admitted or committed to Haverford State Hospital and all other state mental health facilities under the challenged provisions of the state statute.

8. The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is impractical (and the total membership of the class is indeterminate); there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

9. Defendant Jack B. Kremens, Hospital Director of Defendant Haverford State Hospital, is sued as representative of the directors of all mental health facilities in Pennsylvania, all of which are under the authority and supervision and regulation of Defendants Wohlgemuth and Beach. All the allegations in Paragraph 8 above (with the exception of the last clause) are applicable here and are incorporated by reference.

10. The questions of law and fact involved are:

a. Are the representative parties, and their class, admitted or committed involuntarily to Defendant Haverford State Hospital and other mental health facilities pursuant to the challenged statutory provisions?

b. Do Defendants operate, execute and enforce the challenged statutes?

c. Are the challenged statutes contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

V.
PLAINTIFFS

11. Plaintiff Kevin Bartley is a citizen of Pennsylvania, age 16, having been born November 4, 1956.

12. Plaintiff Steve Gentile is a citizen of Pennsylvania, age 18, having been born March 20, 1954.

13. Plaintiff Leslie Levine is a citizen of Pennsylvania, age 15, having been born October 8, 1957.

14. Plaintiff Vicki Mathews is a citizen of Pennsylvania, age 15, having been born September 10, 1957.

15. Plaintiff Mark Weand is a citizen of Pennsylvania, age 15, having been born June 13, 1957.

16. All named Plaintiffs are being held at Defendant Haverford State Hospital against their will having been admitted or committed by Defendants or under their direction pursuant to the challenged sections of the Pennsylvania Mental Health and Mental Retardation Act of 1966. Such admissions and commitments were accomplished without notice, hearing, right to counsel or order of court.

VI.
DEFENDANTS

17. Defendant Haverford State Hospital is a mental health "facility" under Section 102 of the Pennsylvania Mental Health and Mental Retardation Act of 1966. It receives admissions and commitments of persons, including Plaintiffs and their class, under said act.

18. Defendant Jack B. Kremens is Hospital Director of Defendant Haverford State Hospital and is charged with supervision and administration of the facility. See Sections 102 and 203 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 (hereafter the "Act"). It is to Kremens or his delegate that applications for admission, commitment and release must be made. See Sections 402 (b), 403 (b) and 403 (c) of the Act.

19. Defendant Helene Wohlgemuth is the Secretary of Public Welfare of the Commonwealth of Pennsylvania which department has the power and duty to enforce the Act and all regulations necessary and appropriate to the proper accomplishment of the Act and to operate and assign functions to all state facilities. See Sections 201 (2) and 202 (a) of the Act.

20. Defendant William B. Beach, Jr. is the Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania. He has general authority to supervise and regulate mental health facilities within Pennsylvania.

VII.

FACTUAL ALLEGATIONS

Kevin Bartley

21. Plaintiff Kevin Bartley was committed to Haverford State Hospital on November 30, 1971 under Section 403 (a) (2) of the Act.

22. He was committed by his mother although he did not wish to enter the hospital then and does not wish to remain now. Kevin Bartley is critical of many of what he believes are the hospital's shortcomings: e.g., arbitrary regulations, the staff's playing favorites with patients, unnecessary punishments for minor rule infractions, and transfer to locked wards as punishment for mere allegations of wrongdoing, without hearing or proof.

23. Bartley believes that nothing worthwhile is occurring to him inside the hospital and that his time is mostly being wasted. This is true. When he obtains release, he plans to go to school and learn a usable trade.

Steve Gentile

24. Plaintiff Steve Gentile was committed to Haverford State Hospital on August 24, 1971 by his father under Section 403 (a) (2) of the Act.

25. Gentile entered the hospital involuntarily, is being detained there involuntarily and wishes to leave but is restrained from doing so by Defendants and the operation of the challenged portions of the Act.

Leslie Levine

26. Plaintiff Leslie Levine's mother committed her to Haverford State Hospital on October 11, 1972 under Section 403 (a) (2) of the Act.

27. Levine does not wish to remain at the hospital but is restrained from leaving by Defendants and by the operation of the challenged portions of the Act.

28. Levine was committed to the hospital because she does not get along with her mother and sister. Her parents are divorced; her father is remarried and living in Florida. Leslie Levine would like to be with her father; they get along well and, every time she spends some time with him, her behavior is excellent. However, because she is with her mother and sister and does not get along with them, Levine is an involuntary mental hospital patient.

Vicki Mathews

29. Plaintiff Vicki Mathews was committed to Haverford State Hospital on August 9, 1972 by her parents under Section 403 (a) (2) of the Act.

30. She entered the hospital involuntarily.

31. Mathews does not get along well with her parents and has in the past run away from home. If she were considered a "delinquent," and dealt with through the juvenile court process, she could not be institutionalized against her will except after a full hearing, upon order of a court. In fact, as the mental health commitment laws permit, her parents had the choice of avoiding the due process protections afforded juveniles in other contexts and of dealing with her in their own way, thus depriving Mathews of any hearing and committing her to a mental hospital.

32. Because her parents had the financial means, on information and belief, they applied for her discharge from the hospital under Section 403 (c) so that she could be shipped, against her will, to a boarding school in Texas.

Mark Weand

33. Plaintiff Mark Weand was admitted to Haverford State Hospital on June 23, 1972 by his mother under Section 402 (a) (2) of the Act.

34. After another hospital would not admit him because of his age, Weand first entered Haverford for medical reasons because of excess use of drugs. Once at the hospital, his mother was convinced by agents and employees of Defendants to have Weand admitted for psychiatric reasons. Weand did not wish to become a mental patient and repeatedly has informed Defendants' agent's and employees of his desire to leave. They have not permitted him to do so.

35. At the hospital, Weand has not been involved with any therapeutic drug programs because he has not been addicted to any drugs.

36. His mother is concerned about him but will not apply for his release except upon the approval of the hospital physicians, employees and agents of Defendants. If Weand were a voluntary patient under Section 402 of the Act and were over eighteen, he would be permitted to leave the hospital "at any time" regardless of the physicians' approval or opinion.

37. The major reason Weand has been hospitalized for the past five months is that the hospital's agents and employees have considered his attitude hostile and aggressive. The basis for this "hostile" and "aggressive" attitude is Weand's belief that he doesn't belong in the mental hospital and Weand's questioning and criticism of the hospital regimen and his treatment there.

The Statutory Scheme

38. Section 402 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 (50 P.S. § 4402) provides as follows: (Those parts which are challenged as unconstitutional by this Complaint are emphasized by underlining [italics])

Section 402. Voluntary Admission; Application, Examination and Acceptance; Duration of Admission.

(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

(1) Any person *over eighteen years of age.*

(2) *A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.*

(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

(c) *Except where application for admission has been made under the provisions of Section 402(a)(2) and the person admitted is still eighteen years of age or younger,* any person voluntarily admitted shall be free to withdraw at any time. *Where application has been made under the provisions of Section 402(a)(2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.*

(d) Omitted here.

39. Section 403 of the Act (50 P.S. § 4403) provides as follows: (Those parts which are challenged as unconstitutional by this Complaint are emphasized by underlining [italics])

Section 403. Voluntary Commitment; Application, Examination and Acceptance; Duration of Commitment.

(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

(1) Any person *over eighteen years of age.*

(2) *A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.*

(b) The application shall be in writing, signed by the applicant in the presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he shall be committed for a period not to exceed thirty days. Successive applications for continued voluntary commitment may be made for successive periods not to exceed thirty days each, so long as care or observation is necessary.

(c) No person voluntarily committed shall be detained for more than ten days after he has given written notice to the director of his intention or desire to leave the facility, *or after the applicant or his successor has given notice of intention or desire to remove the detained person.*

(d) Omitted here.

40. The only other provisions for civil commitment to a mental health facility provided by the Act are:

a. Section 404 which permitted commitment of persons upon application of third parties (including parents, guardians, individuals standing in loco parentis, etc.) upon application with certificates of two physicians. Because of its denial of Constitutional Due Process rights, this section has been declared unconstitutional. See Section 404 and *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971).

b. Section 405 permits involuntary detention of persons, regardless of age, under emergency conditions for no longer than ten days.

c. Section 406 permits involuntary commitment of persons, regardless of age, upon petition to the state court of common pleas, and after hearing and examination. The respondent to such petition has the right to notice of the hearing, the right to counsel and the opportunity and right to present testimony and evidence in his or her behalf and to confront his or her accusers. The court may order outpatient or partial hospitalization instead of in-hospital commitment.

VIII.
FIRST CAUSE OF ACTION

For a First Cause of Action, Plaintiffs reallege Paragraphs 1 through 40 above, which are incorporated herein by reference, and further allege:

41. Voluntary patients over eighteen years of age enter facilities under the Act on their own application and volition under Section 402 or 403 and may leave and discharge themselves either at any time (Section 402) or upon proper written notice (Section 403). Plaintiffs and their class are denied such entrance and separation from the facility by the challenged portions of these sections of the Act.

42. The statute thus creates two classes of potential and actual "voluntary" admittees, distinguishable only on the basis of age. There is no adequate state justification for this arbitrary classification.

43. A person over eighteen years of age who does not wish to enter a facility may be placed there involuntarily only upon the order of a court pursuant to the procedures, including a petition, notice and hearing, mandated by Section 406 of the Act. A person under eighteen years of age who does not wish to enter a facility may be placed there involuntarily simply upon the application of a parent, guardian or individual standing in loco parentis; no notice or petition is required nor is any sort of hearing or court order provided for.

44. The statute thus creates two classes of potential and actual involuntary admittees and committees, distinguishable only on the basis of age. There is no adequate state justification for this arbitrary classification.

45. The challenged portions of the Act, and Defendants' actions in operating, enforcing and executing the same, deny Plaintiffs and their class the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

IX.
SECOND CAUSE OF ACTION

For a Second Cause of Action, Plaintiffs reallege Paragraphs 1 through 40 above, which are incorporated herein by reference, and further allege:

46. By operation of the challenged portions of the Act, Plaintiffs and their class are detained and incarcerated involuntarily in mental hospitals and other facilities without:

a. the right to notice;

b. the right to a hearing;

c. the right to counsel and, if indigent, appointment of counsel;

d. the right to present evidence and testimony on their own behalf;

e. the right to subpoena witnesses and documents;

f. the right to confront and cross-examine witnesses against them and those who wish them to enter a facility;

g. the right to independent expert examination and assistance;

h. the right to be involuntarily detained only upon decision of a distinterested and impartial decision-maker;

i. the right to be involuntarily detained only upon a decision that they are in need of care treatment or observation, such decision being based on clear and convincing evidence;

j. the right to appeal and review, including provision for assistance of counsel and record and transcript without cost if appellant is unable to pay the cost thereof;

k. other procedural safeguards.

47. By operation of the challenged portions of the Act, and by Defendants' actions in operating, enforcing and executing the same, Plaintiffs and their class are deprived of their life, liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

X.
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Assume jurisdiction of this cause, convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 to determine this controversy, and set this case promptly for an expedited hearing;

2. Determine by Order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action;

3. Enter a final judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the challenged portions of the Pennsylvania Mental Health and Mental Retardation Act of 1966, that is 50 P.S. §§ 4402(a)

(1), 4402(a)(2), 4402(c), 4403(a)(1), 4403(a)(2) and 4403(c) (see paragraphs 38 and 39 above), are invalid, void and of no effect on the grounds that they violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

4. Enter preliminary and permanent injunctions enjoining Defendants from enforcing and executing such statutory provisions;

5. Award damages to each of the named Plaintiffs in the amount of $15,000 each for unconstitutional deprivation of their rights;

6. Allow Plaintiffs their costs herein and reasonable attorney's fees;

7. Grant such additional and alternative relief as may be deemed by this Court appropriate, just, proper and equitable.

Respectfully submitted,

(s) David Ferleger
David Ferleger
Attorney and Next Friend for Plaintiffs
Mental Patient Civil Liberties Project
121 South 18th Street
Philadelphia, Pa. 19103
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On the Brief:
Ronald Soskin
Stan Abramson

Dated November 16, 1972

MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley, et al.,
Plaintiffs

v.

Haverford State Hospital, et al.,
Defendants

MOTION TO DISMISS

Defendants move that this Honorable Court dismiss the above captioned action on the basis that Plaintiffs have failed to plead an action upon which relief may be granted.

Marx S. Leopold
Assistant Attorney General

December 12, 1972

ANSWER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley; Steve Gentile; Leslie Levine; Vicki Mathews; Mark Weand, minors, through their next friend, individually and on behalf of all others similarly situated,

Plaintiffs

v.

Jack B. Kremens, Hospital Director of Haverford State Hospital; Helene Wohlgemuth, Secretary of Public Welfare of the Commonwealth of Pennsylvania; William B. Beach, Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,

Defendants

ANSWER

First Defense

Preliminary Statement

Plaintiffs in this Complaint attack the constitutionality of Sections 402 and 403 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 (50 P.S. 402, 403) which permits the voluntary commitment of persons 18 years of age or under by parents or persons standing in loco parentis. Defendants contend that these portions of the Act as well as regulations adopted in September, 1973, maintain the constitutionality of the attacked regulations and furthermore do not conflict with the Fourteenth Amendment to the United States Constitution.

Second Defense

Defendants admit the allegations contained in Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 24, 26, 29, 33, 41, 38, 39, and 40; admit in part allegation 22 that Plaintiff Bartley who was discharged on April 1, 1973, did not wish to enter the hospital nor remain and that Plaintiff Bartley was critical of hospital procedures and deny that any hospital procedures are arbitrary or inconsistent with beneficial treatment; admit in part allegation 23 that Defendants knew Plaintiff Bartley planned to go to school and learn a useable trade upon release because Defendants made arrangements for said school and deny that "nothing worthwhile is occurring to him inside the hospital" when in fact Plaintiff Bartley was receiving specialized treatment; admit in part allegation 28 that Plaintiff Levine's parents are divorced, that her father is remarried and living in Florida, that she would like to live with her father, and deny that she was solely committed to the hospital because she does not get along with her mother and sister when in fact she has threatened their lives several times and suffers from a personality disorder; admit in part allegation 32 that Vicki Mathew's parents on November 7, 1972 applied for and received Plaintiff Mathew's discharge from the hospital, that Defend-

ants are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Plaintiff's parents' financial means; admit in part in allegation 34 that Plaintiff Weand did not wish to become a mental patient and has informed Defendants' agents and employes of his desires to leave which occurred on December 1, 1972, that Defendants deny that Plaintiff Weand was admitted because of excess use of drugs when in fact that is part of his problem which is a psychiatric maladjustment; admit in part in allegation 35 that Plaintiff Weand has not been involved with any therapeutic drug program because his condition warrants other treatment programs in which he has participated; admit in part in allegation 43 that a person over 18 years of age who does not wish to enter a facility may be placed there involuntarily upon Order of the court pursuant to a petition, notice and hearing mandated by Section 406 of the Act, that Defendants deny that persons under 18 years of age who do not wish to enter a facility may be placed there when in fact adopted regulations of September, 1973 reveal that a juvenile who objects will be afforded counsel and ultimately a 406 hearing; and deny each and every other allegation contained in the Complaint.

Respectfully submitted,

BARRY A. ROTH
MARX S. LEOPOLD
Assistant Attorneys General
ISRAEL PACKEL
Attorney General
Counsel for Defendants

Dated: June 3, 1974

CERTIFICATE OF SERVICE

I certify that on this day of June, 1974, I mailed true and correct copies of the foregoing to David Ferleger, Esquire, Counsel for Plaintiffs, at his office at the Mental Patient Civil Liberties Project, Suite 1407, 1315 Walnut Street, Philadelphia, Pennsylvania 19107.

BARRY A. ROTH
Assistant Attorney General

OPINION—JULY 24, 1975

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley, et al.

vs.

Jack B. Kremens, individually and as Hospital Director of Haverford State Hospital, et al.

Before Honorable John J. Gibbons, Circuit Judge, and Honorable Daniel H. Huyett, 3rd, and Honorable Raymond J. Broderick, District Judges

HUYETT, J., July 24, 1975:

OPINION AND ORDER

Plaintiffs have filed this class action[1] on behalf of the named plaintiffs and all persons eighteen years of age or younger who have been, are, or may be admitted or committed to mental health facilities in Pennsylvania under the Pennsylvania Mental Health and Mental Retardation Act (Act). 50 P.S. §§4402 and 4403 (§§402 and 403).[2] Invoking 28 U.S.C. §1331 and 1343 (3) and 42 U.S.C.

[1] On April 29, 1974, we ordered that this action be maintained as a class action but left open the possibility that the definition of the class set out in the text might be amended or altered before the decision on the merits. We now find that this definition of the class is appropriate. We note that this action concerns children who allegedly are mentally ill as well as children who allegedly are mentally retarded.

[2] Section 402 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 provides in part:

Section 402. Voluntary admission; application, examination and acceptance; duration of admission.

(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

(c) Except where application has been made under the provisions of Section 402(a)(2) and the person admitted is still eighteen years of age or younger, any person voluntarily admitted shall be free to withdraw at any time. Where application has been made under the provisions of Section 402 (a)(2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.

Section 403 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 provides in part:

Section 403. Voluntary commitment; application, examination and acceptance; duration of commitment.

(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

§1983, plaintiffs ask us to declare §§402 and 403 unconstitutional and to enjoin their enforcement.[3]

Plaintiffs contend that in violation of the Fourteenth Amendment to the United States Constitution, they are being denied both due process of law and equal protection of law because Pennsylvania allows plaintiffs and their class to be detained—denied their liberty—in mental institutions without substantial procedural safeguards including the: (1) right to notice; (2) right to a pre-commitment hearing; (3) right to counsel and if indigent appointment of counsel; (4) right to present evidence on

(b) The application shall be in writing, signed by the applicant in the presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he shall be committed for a period not to exceed thirty days. Successive applications for continued voluntary commitment may be made for successive periods not to exceed thirty days each, so long as care or observation is necessary.

(c) No person voluntarily committed shall be detained for more than ten days after he has given written notice to the director of his intention or desire to leave the facility, or after the applicant or his successor has given written notice of intention or desire to remove the detained person.

[3] Plaintiffs do not challenge either Section 405 or 406 of the Pennsylvania Mental Health and Mental Retardation Act of 1966. Section 405 permits involuntary detention of persons, regardless of age, under emergency conditions for no longer than 10 days. Section 406 permits involuntary commitment of persons upon petition to the state court of common pleas and after hearing and examination. The person to be committed is entitled to notice of hearing, the right to counsel, and the opportunity and right to present testimony and evidence in his or her behalf and to confront his or her accusers. The court may order outpatient or partial hospitalization instead of in-hospital commitment.

their own behalf; (5) right to subpoena witnesses and documents; (6) right to confront and cross-examine witnesses against them and those who wish to admit or commit them; (7) right to be involuntarily detained only upon a decision of a judicial officer; (8) right to be involuntarily detained only upon a decision that they are in need of treatment, care, or observation.[4] Plaintiffs also contend that the regulations supplementing §§402 and 403 do not cure these sections of their constitutional infirmities because they apply only to children 13 years of age or older, require no pre-commitment hearing, and designate no time by which a post-commitment hearing must be held.[5] In essence, plaintiffs claim that the present pro-

[4] We are not presented with the issue of what standards are needed for commitment. For an analysis of this question see the recent opinion of J. Hoffman in *Commonwealth ex rel. Charles Finkin, Jr. v. Roop,* Pa. Superior Ct. (1975). Also see, *Bell v. Wayne County,* 384 F. Supp. 1085, 1095 (E.D. Mich. 1974).

[5] After plaintiffs filed this action the Department of Public Welfare, pursuant to Section 201(2) of the Pennsylvania Mental Health and Mental Retardation Act of 1966, adopted additional procedural safe-guards for children admitted or committed to institutions pursuant to Sections 402 and 403. These regulations provide in part:

1. All juveniles aged 18 and younger to be admitted to an Institution must be referred from a recognized medical facility Mental Health/Mental Retardation therapist or Mental Health Agency; however, mentally retarded juveniles may be referred by either a pediatrician, or general physician or psychologist;

2. This referral must be accomplished by a psychiatric evaluation and that report must indicate with specificity the reasons that the person requires institutional care; however, a medical or psychological evaluation may accompany the referral of a mentally retarded juvenile;

cedures do not adequately assure against the mistaken commitment of children who are not mentally ill.

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3. The Director of the Institution or his delegate, shall have conducted an independent examination of the proposed juvenile, and if his results disagree with the professional's opinion, the Director, or his delegate shall discharge the juvenile;

4. The telephone number and address of the juvenile's parents or the person who is requesting admission for the juvenile must accompany the referral;

5. Within 24 hours after the juvenile's admission, every youth who is at least 13 years of age must receive written notification (which he signs) explaining his rights indicating that he will be given a status report periodically of his condition; that he can contact by telephone or by mail his parents or the person who requested his admission; and that he will be furnished with the number of counsel (Public Defender's number; Legal Services) that he can call for representation. An appropriate person shall explain this notice (attached);

6. In the event that a juvenile whose chronological age is 13 or older objects (either orally or in writing) to remaining in the Institution, the Director, or his delegate, if he feels it is necessary for the youth to remain, may continue the institutionalization for two business days during which time he shall notify the applicant and the referral unit so that either party may institute a 406 proceeding. During that same two-day period, the Director, or his delegate, shall notify the Public Defender's Office or notify Legal Services readily available of the juvenile's need for legal representation. If a 406 proceeding is begun during the two-day period, the juvenile shall remain institutionalized. If the applicant cannot be located and the Director, or his delegate, feels that the juvenile does not require institutionalization, the Director, or his delegate, shall direct the Base Service Unit to assume responsibility of providing for the juvenile's aftercare. However, if the Director, or his delegate, feels that the juvenile requires institutionalization, he shall direct the Base Service

In support of their claim that §§402 and 403 are unconstitutional, plaintiffs have submitted brief summaries of the reasons for the commitment of the named plaintiffs and other members of their class to demonstrate that many decisions to commit involve factual determinations requiring substantial procedures to guard against wrongful or erroneous commitment. We rely for our findings on the summaries contained in the final pretrial order which have been stipulated to and on defendants' exhibit numbered eight (8).

The named plaintiffs were either admitted under §402 or committed under §403 to Haverford State Hospital.[6] Plaintiff M.W. was admitted to Haverford State

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Unit to file a 406 proceeding within two days after failure to locate the applicant;

7. The juvenile's counsel shall be furnished with the juvenile's evaluation from the referral unit, with a psychiatric evaluation from the Institution, and with a written report of the reasons to institutionalize the juvenile;

8. If the staff member of the facility giving notice to the patient determines that the patient is incapable of understanding the notification, it shall be written on the notification;

The regulations do not provide a time by which a commitment hearing must be held. The Attorney General of Pennsylvania assures us that in cases involving children at least 13 years of age, commitment hearings are scheduled within a short while after the child objects. With respect to children 12 years of age or younger, there is no requirement for a hearing, no less a designated time. Defendants submit that these regulations were not adopted with and towards this litigation and that with or without them, Sections 402 and 403 are constitutional.

[6] By stipulation Haverford State Hospital was withdrawn as a defendant. Haverford is a mental health "facility" under Section 102 P.S. §4102 of the Mental Health and Mental Retardation

Hospital under §402(a)(2). His mother admitted him allegedly against his wishes when he was fifteen and on December 1, 1972, he informed agents and employees of defendant of his desire to leave Haverford State Hospital. Plaintiffs K.B., S.G., L.L., and V.M. were committed to Haverford State Hospital under §403(a)(2). Plaintiff K.B. was fifteen when his mother committed him against his wishes. He was and still is critical of some of the hospital's regulations and treatment practices. Plaintiff S.G. was seventeen when his father committed him allegedly against his wishes. Plaintiff L.L. was fifteen when her mother committed her allegedly against her wishes. Her difficulties in relating to her mother resulted in her commitment. Hospital records show that she threatened the lives of her mother and sister and that she has a personality disorder. Her parents are divorced and her father is remarried, living in Florida. At the time of her commitment and the time this action was filed, she would have preferred to have been with her father and when she is with him her behavior is excellent. Plaintiff V.M. was fourteen when her mother committed her allegedly against her wishes.

Members of plaintiffs' class have been institutionalized for various other reasons. Patient number 13,173, a moderately retarded 13 year old child, was institutionalized in Polk State Hospital because of very sudden, explosive, rage reactions during which he attacked others and of which he has no recollection. His behavior rather than his mental retardation was the primary obstacle to his return to the community. Patient number 13,212, an

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Act. It receives admissions and commitments of persons including persons eighteen years of age or younger admitted or committed under Sections 402 and 403.

educable mongoloid boy with the capacity to participate in many educable and trainable activities and who can be helped by an active special elementary program in public schools, was institutionalized in Polk State Hospital for a 1 to 2 week period so that the other members of his family could go on a family vacation. Patient number 288, a mentally retarded child, was placed in Western State Hospital because of a poor family situation. The mother of the child did not get along well with the child, and the family was afraid that she would have another nervous breakdown if the child were not placed in Western State Hospital. Patient number 281, a mentally retarded child, was placed in a state institution because she had become a management problem to both her parents and the community. Patient number 15, a mentally retarded child, was placed in Western State Hospital because the child interfered with the routine of the household and disturbed family members. The placement was based on a fear that if the child remained in his home, the mother might break down, the marriage of the child's parents might end in separation, the father's health might fail, and an adolescent daughter might be pushed into a premature marriage to escape an unhappy home. Class members have also been committed to mental hospitals for running away, robbing a gas station, stealing in general, chasing and striking a girl, arson, delinquent behavior in general, truancy, physical ailments such as colitis and weight loss, school phobia, and drug overdose.

At the time this action was filed defendants were all Pennsylvania officials with specific duties under the Act. Defendant Jack B. Kremens as Hospital Director of Haverford State Hospital was charged under 50 P.S. §§4102 and 4203 with supervision and administration of Haver-

ford State Hospital. It was to Kremens or his delegates that application for admission and commitment under §§402 (b) and 403 (b) of the Act had to be made. Defendant Helene Wohlgemuth as Secretary of Public Welfare of the Commonwealth of Pennsylvania (Secretary) had the power under 50 P.S. §§4201 and 4202 (a) to enforce the Act, to make all regulations necessary and appropriate to the proper accomplishment of the Act, and to operate and assign functions to all state facilities. Defendant William B. Beach as the Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania had the general authority to supervise and regulate mental health facilities in Pennsylvania.

At the outset, defendants contend that since the purpose of the Act is to meet the child's needs through treatment and rehabilitation rather than to punish the child by incarceration for what he has done, the requirements of due process do not apply to the institutionalizing of children under §§402 and 403.[7] Defendants proceed to argue

[7] A number of defendants in similar cases have raised this argument. In *In re Gault*, 387 U.S. 1, 21 (1966), defendants claimed that juveniles obtain benefits from the informal juvenile procedures which more than offset the disadvantages of denying them the substance of normal due process. The Court rejected this argument holding:

> observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.

In *Denton v. Commonwealth*, 383 S.W. 2d 681 (Ky. 1964), cited approvingly by Judge Biggs in *Dixon v. Attorney General of Pennsylvania*, 325 F. Supp. 966, 972 (M.D. Pa. 1971), the court also rejected this argument holding that commitment procedures should be the same in civil commitment proceedings as they are in criminal proceedings. Responding to this same argument, Judge Biggs in *Dixon* stated: "We are unimpressed by the parens patriae argument and strong courts have not been persuaded by it." (citations omitted). In Holm v. State, 404 P. 2d 740, 742 (Wyo. 1965) the Wyoming Supreme Court held:

> No matter how commendable the motives back of legislation for the mentally ill may be it still remains the fundamental law of the land that a person is not to be deprived of his liberty—whether by involuntary hospitalization or some other kind of incarceration—without due process of law.

In *Heryford v. Parker*, 396 F.2d 393 (10 Cir. 1968), the court held that even if the institutionalizing of children is for rehabilitation, the constitutional safeguards of due process must be observed. The court in *Lessard v. Schmidt*, 349 F. Supp. 1078 (— Wis. 1972), was faced with the argument that due process procedures should be relaxed because of a subsequent right to treatment and because the commitment proceedings were civil in nature. After examining the effect civil commitment may have on those adjudged mentally ill, the court rejected these arguments and held that all persons 18 years of age or older being held pursuant to any emergency, temporary, or permanent commitment provision of the Wisconsin involuntary commitment statute, were entitled to substantial procedural safeguards. *Saville v. Treadway*, F. Supp. (M.D. Tenn. 1974) presented a challenge to a Tennessee Statute which permitted the "voluntary" commitment of juveniles by a parent, guardian, or person having legal custody of a mentally retarded minor. While recognizing the services furnished to mentally retarded children by the state, and the efforts in mental rehabilitation of the state, the court held that "where individual liberty is at stake . . . it is absolutely essential that such confinement be preceded by adequate procedural safeguards."

that if we determine that due process applies, we should find that in light of Pennsylvania's interest in protecting the child, preserving the family unit, maintaining the rights of parents to the custody, care, and upbringing of their children, and protecting society, the present statutes and

regulations satisfy any due process requirements. Finally, defendants argue that since under §§402 and 403 the parents, guardians ad litem, or persons standing in loco parentis must set into motion the commitment machinery, these persons effectively waive any due process rights of plaintiffs and their class.

DISCUSSION

Under the constitutional guarantee of procedural due process, we have developed a system whereby a person who may be subjected to a grievous loss of liberty is entitled to adequate procedural safeguards. *Wolff v. Mc Donnell,* 418 U.S. 539 (1974). Generally, the state is required to provide substantial procedures when there is the possibility of erroneously and wrongfully depriving persons of their liberty by committing them to mental institutions. See, concurring Opinion of Chief Justice Burger in *O'Connor v. Donaldson,* 43 U.S.L.W. 4929, 4935 (1975); *Lynch v. Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Lessard v. Schmidt,* 349 F. Supp. 1078, remanded 414 U.S. 473 (1974), redecided 379 F. Supp. 1376 (1974), remanded 43 U.S.L.W. 3600 (May 12, 1975); *Dixon v. Attorney General Commonwealth of Pennsylvania,* 325 F. Supp. 966 (M.D. Pa. 1971). These safeguards attempt to protect persons from an arbitrary or erroneous deprivation of liberty or property, whether that deprivation be imposed for benevolent or punitive reasons. They are "our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present." They "enhance the possibility that truth will emerge from the confrontations of opposing versions and

conflicting data." *In re Gault,* 387 U.S. 1, 21 (1966). As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York,* 324 U.S. 401, 414 (1945) (separate opinion) cited by the majority in *In re Gault,* at 21. If we are to preserve our traditional liberty we must scrutinize with care any claim that it is being arbitrarily denied.

In deciding whether the requirements of due process apply in any given case, the threshold question is whether the interest of the complaining party is within the contemplation of the liberty or property language of the Fourteenth Amendment. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1971). The particular question here is whether or not a child's interest in not being institutionalized under §§402 and 403 is safeguarded by the Fourteenth Amendment. Defendants would have us find that because Pennsylvania is acting as parens patriae and not as an adversary, and because the admission and commitment proceedings are civil, not criminal, in nature, plaintiffs and their class may not complain of the deprivation of procedures available in criminal cases. Such a finding would ignore that the child is involuntarily removed from his home and familiar surroundings and is committed to an institution where "[he] suddenly faces the regimented routine of ward life and daily confrontation with state employees, however capable, rather than family and friends." *In re Ballay,* 482 F.2d 648, 669 (D.C. Cir. 1973). As the Court of Appeals for the Tenth Circuit noted in *Heryford v. Parker,* 396 F.2d 393, 396 (1968):

> It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is

> the likelihood of involuntary incarceration whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.

Defendants' contention also ignores the stigma associated with civil commitment which some commentators and courts have noted may render civil commitment a more lasting abridgement of personal freedom than imprisonment for commission of a crime.[8] The child who faces

[8] Loss of liberty is in issue not only when a person is physically confined. The Due Process Clause also affords protection "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Goss v. Lopez*, 419 U.S. 565 (1975); *Donalds v. O'Connor*, 493 F.2d 507, 520 (5 Cir. 1974), vacated and remanded *O'Connor v. Donaldson*, 43 U.S.L.W. 4929 (1975).

While we hope that society is moving in the direction of viewing mental illness in the same light as physical illness, we cannot ignore the reality that many in our society view mental illness with disdain or apprehension. See *In re Ballay*, 482 F.2d 648, 668 (D.C. Cir. 1973), where the court noted that, "[e]ven accepting recent medical advances, current studies clearly indicate the fallacy of contending that most people view mental illness as a disease similar to any physical ailment of the body" and that it could not "ignore the striking example of this attitude displayed by news stories and public reaction to disclosures made by a recent vice-presidential aspirant." In *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279, 293 (E.D. Pa. 1972), Judge Masterson, writing for the three judge court, held that in light of *Wisconsin v. Constantineau, supra*, due process requires a hearing before retarded children may be denied a public education because of the stigma which our society unfortunately attaches to the label of mental retardation.

the possibility of being physically confined for an indeterminate period with all of the ramifications of such confinement clearly has an interest within the contemplation of the liberty and property language of the Fourteenth Amendment.

Having decided that due process applies, we are left with the questions of what process is due, *Morrissey v. Brewer, supra,* at 481 and whether this process may effectively be waived by plaintiffs' parents, guardians ad litem, or persons standing in loco parentis.[9] Before discussing the process here, we shall first consider whether or not parents, guardians ad litem, or persons standing in loco parentis may effectively waive the personal rights of children, since such a finding obviates the need to decide whether the present procedure violates the constitutional right of plaintiffs to procedural due process. The question is both difficult and unique. Viewing the issue as whether or not a parent may effectively waive personal rights of a child when the child objects to the waiver creates a confrontation between a liberty interest of plaintiffs we find constitutionally protected and the consistently recognized authority of parents to direct the rearing of their children. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

We presume that in most instances parents, proceeding in utmost good faith, acting for the child, in the child's

[9] As yet, the Supreme Court has not decided whether the child's parent, acting on behalf of the child, may effectively waive constitutional rights of the child. In *Heryford v. Parker, supra,* the court, in holding that the Due Process Clause applies to an involuntary civil commitment procedure, recognized that special problems may arise with respect to the effective waiver of rights by minors and mentally deficient persons. Finding that there was no express attempt to make such a waiver, the court did not decide the issue.

best interests, properly guide, protect, and control their children. In *Wisconsin v. Yoder*, 406 U.S. 205, 231, 232 (1971), the Supreme Court, stating that it was not determining the proper reconciliation of possible competing interests of parents, children, and the state, noted that:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Also see, Justice Stewart's concurring opinion at 237. We are not unmindful of this tradition and its importance to the structure of our society, *Ginsberg* at 639, and if we could find that in all instances parents act in the best interest of their children, we might also find that parents may waive constitutional rights of their children. Unfortunately, as such a graphic example as parental child abuse illustrated,[10] this is not the case.[11] In deciding to institutionalize their children, parents, as well as guardians

[10] See Memorandum and Order of Judge Urbom filed June 4, 1974, in *Horacek, etc., v. Exon, et al.*, Civil Action No. 72-L-299 (D.C. Neb. 1974). The claim before Judge Urbom was that the named plaintiffs were in a state hospital because their parents put them there. Responding to the argument that plaintiffs were in the hospital voluntarily because their parents placed them there, Judge Urbom held that "parents cannot deprive their children of constitutional rights—rights of the children vis-a-vis the state."

[11] Dissenting in *Kent v. United States*, 401 F.2d 408, 416, n.4 (D.C. Cir. 1968), the now Chief Justice Burger noted:

> Lawmakers in recent years have been sensitive to the need to make civil commitment difficult recognizing the dangers of relatives "farming" out their kindred into mental institutions for motives not always worthy.

ad litem or persons standing in loco parentis, may at times be acting against the interests of their children. With this in mind we must agree with Judge Judd in *New York State Association for Retarded Children*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973), that, "in the absence of evidence that the child's interests have been fully considered," parents may not effectively waive personal constitutional rights of their children.[12]

Remaining is the question of what process is due. Due process is flexible in that a determination of what process is due cannot be made without an evaluation of "the precise nature of the government function involved as well as of the private interest that has been affected by government action." *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). At a minimum, it requires that "deprivation of . . . liberty . . . by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case,"[13] but the formalities of

In *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973), the court stated:

> [t]here may be a fundamental conflict of interest between a parent who is ready to avoid the responsibility of caring for an abnormal child, and the best interests of the child. Murdock, [Civil Rights of the Mentally Retarded: Some Critical Issues], 48 Notre Dame Lawyer at 139-143.

[12] This finding does not mean that when considering whether or not to institutionalize a child, the state should ignore the opinions and observations of the child's parents. Rather, the committing authorities should listen carefully to parents who live with and observe the child on a daily basis for they very likely have invaluable information concerning their child.

[13] *Goss v. Lopez*, 419 U.S. 565, 79 (1975), citing *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

the procedure however, "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved."[14] Because courts cannot determine what process is due without evaluating the competing interests, the content of due process shifts as the interests shift; "[t]he required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it."[15]

As previously discussed, plaintiffs' interest in being free from the wrongful and unwarranted deprivation of their liberty is substantial and they argue that the present procedure does not adequately protect this interest. The state's interests are threefold. It has an interest in the mental health of children (parens patriae), an interest in preserving the family unit and maintaining parental authority over children, and an interest in confining, for the protection of society those persons who pose significant danger to the community (police power). The state has decided that its interests require a relaxed, informal procedure, and it argues that a more formal procedure will substantially interfere with its interests. To strike a proper balance between the competing interests of plaintiffs and the state, we shall analyze them in the context of each procedural right of which plaintiffs claim they are being deprived. This will give us the content of the process

[14] *Goss v. Lopez*, at 579, citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer, supra*, at 481.

[15] See, Friendly, J. "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1278 (1975).

which, at a minimum, is due before plaintiffs may be institutionalized for treatment.[16]

PRE-COMMITMENT HEARING

A decision to institutionalize a child is often a difficult yet necessary decision for a child's parent to make. It is generally pursued only after all other alternatives have proven futile. The state has an interest in seeing that a procedural system will not deter parents, already faced with this difficult decision, from attempting to institutionalize children who are in need of treatment only mental institutions can provide. Further, to protect society and the individual child, the state has an interest in the immediate detention of children who may be dangerous to themselves or others. See, *Lessard v. Schmidt*, at 1092; Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1275 (1974).

[16] As we have already noted, due process is flexible; the Constitution mandates no specific code of procedures. We are aware of the problems facing courts when they attempt to fashion procedures protecting interests within the liberty and property language of the FourteenthAmendment and we are sensitive to the claim that courts are "good at deciding cases, bad at drafting legislation. . . ." See, Friendly, J. "Some Kind of Hearing" supra. When presented with claims of constitutional dimension, however, we are constrained, when legislative bodies have failed to act, to find means of enforcing the constitutional rights being denied. Our action is not intended to pre-empt the state which is free to develop its own safeguards so long as they are as fully effective as those which we set out. See *Miranda v. Arizona*, 384 U.S. 436, 490 (1966); *Morrissey*, at 490.

Balancing these substantial interests of the state with that of the child, we find that plaintiffs are not entitled to a pre-commitment hearing. As the Supreme Court has found with criminal cases, however, we find that, for the protection of the child, he is entitled to a hearing before an unbiased tribunal within a reasonable time to test whether there is probable cause to believe institutionalization is necessary. *McNabb v. United States,* 318 U.S. 332, 343-344 (1943); *Morrissey v. Brewer,* at 489 (1971); *Lynch v. Baxley,* at 388. In no event shall detention of the child in the absence of a probable cause hearing exceed seventy-two (72) hours from the date of the initial detention. See, *Lynch v. Baxley,* at 388; *Lessard v. Schmidt,* at 1091.[17]

POST-COMMITMENT HEARING

If the conclusion of the preliminary hearing is that there is probable cause for believing the child needs institutionalization, the child is entitled to a post-commitment hearing before an unbiased tribunal on the need for commitment. A delay after the probable cause hearing is permissible. This delay will allow the child to adjust to his new surroundings and will allow both the state and the child time to prepare for the post-commitment hearing to come. It will also allow the state time to examine and

[17] In *Lynch v. Baxley,* at 388, the court held that emergency detention without a hearing on its appropriateness may not, in the absence of a probable cause hearing, exceed seven (7) days from the date of the initial detention. In *Lessard v. Schmidt,* at 1091, the court held that a probable cause hearing must be held within forty-eight (48) hours from the date of the initial detention.

diagnose the child adequately. These reasons do not, however, justify a prolonged period of confinement without a final determination on the need for institutionalization and should not exceed a two-week period. A two-week period will afford all parties an opportunity to prepare adequately and properly their positions with hope of ascertaining that which is best for the child.[18]

NOTICE

The opportunity to be heard is fundamental to due process of law. *Grannis v. Ordean,* 234 U.S. 385, 394 (1914). Without notice of that which is to transpire at a hearing "sufficiently in advance of any required hearings so that reasonable opportunities to prepare will be afforded," *In re Gault,* at 33; *Lessard v. Schmidt,* at 1092; *Lynch v. Baxley,* at 388, the right to be heard has little significance. *Mullane v. Central Hanover Tr. Co.,* at 314. To counterbalance this substantial interest of plaintiffs the state argues that by delaying treatment and traumatizing the child, the requirement of notice will aggravate the child's mental illness, interfere with the state's police power, and disrupt family harmony. In *Gault* at 21, the Supreme Court refused to accept the state's fear of trauma as a justification for limited procedures. The Court stated that the observance of due process standards will not necessarily compel the states to abandon the substantive benefits of the juvenile process. Further, as Judge Tamm

[18] Until the legislature acts to establish an unbiased tribunal to conduct the probable cause and final hearings the present facilities of the Commonwealth court system shall be used for these hearings.

noted in *In re Ballay*, 482 F.2d 648, 664 (D.C. Cir. 1973), the fear that added procedural requirements will produce trauma presupposes that the person who faces commitment is mentally ill. Likewise, while procedural safeguards assume that not all persons who face commitment need actually be committed, the argument that procedures will interfere with the state's police power and disrupt family harmony assumes that the child is dangerous to others and comes from a family in harmony.

Keeping in mind that due process assures against error, we find written notice required, including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment. See, *Lynch v. Baxley*, at 388; *Lessard v. Schmidt*, at 1092. Neither the state nor plaintiffs have an interest in committing to mental institutions children not in need of institutionalization. Notice should not shield children in need of institutionalization from commitment and treatment but rather should protect children not in need of institutionalization from wrongful commitment and improper deprivation of their liberty.[19]

COUNSEL

The state fears that assistance of counsel will make institutionalization proceedings adversarial adding to the

[19] Obviously this notice may be meaningless to some children. We, therefore, find that until some other procedure is established this notice shall be sent not only to the child but also to the Clerk of the Court with jurisdiction and shall be forwarded to the child's attorney. The child's attorney shall be in receipt of the notice at least forty-eight (48) hours prior to the initial hearing.

delay in treatment of the child and increasing the danger of trauma already inflicted by notice and a hearing. Yet the spectre of this particular trauma pales beside the spectre of the trauma inflicted on a child erroneously committed.[20] Notice and the opportunity to be heard may be of little value without the assistance of counsel. *Argesinger v. Hamlin*, 407 U.S. 25, 31 (1972); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). A child whose liberty is in question "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Gault*, at 36. As the right to counsel applies to criminal cases, so it must apply during all significant stages of the commitment process, and plaintiffs must be informed of both their right to counsel and if indigent their right to appointment of free counsel. See, *In re Gault*, at 41; *Heryford v. Parker*, at 397; *Dixon v. Attor-*

[20] The possibility and danger of error is discussed by D. L. Rosenhan in "On Being Sane in Insane Places," 179 Science 250 (1973). The article describes an experiment in which eight sane persons gained admission to twelve different hospitals and behaved normally. Their sanity was never discovered. Not only was their sanity not detected, but the psychodiagnostic label placed on the individual patients was never removed. According to Professor Rosenhan this error apparently resulted from what statisticians call type two error—error resulting from a Doctor's inclination to call a healthy person sick rather than a sick person healthy because it is more dangerous to misdiagnose illness than health.

Rosenhan suggests that the initial labelings color others' perception of the patient and eventually the patient himself accepts the diagnosis, with all of its connotations and expectations, and behaves accordingly. He also notes that there is substantial evidence that attitudes towards the mentally ill are characterized by fear, hostility, aloofness, and dread.

ney General, at 966; *Lessard v. Schmidt,* at 1097; *Lynch v. Baxley,* at 389; *United States v. Wade,* 388 U.S. 218, 226-27 (1967); *In re Barnard,* 455 F.2d 1370, 1375-76 (D.C. Cir. 1971); *Sarzan v. Gaughan,* 489 F.2d 1076, 1083-84 (1 Cir. 1973).

PRESENCE OF PERSON

In *Specht v. United States,* 386 U.S. 605, 610 (1967), the Supreme Court held that commitment proceedings under the Colorado Sex Offenders Act, whether denominated civil or criminal, are subject to the Due Process Clause of the Fourteenth Amendment and that due process requires that the person to be committed "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." Also see, *Lynch v. Baxley,* at 394. In *Illinois v. Allen,* 397 U.S. 337, 342 (1969) the Court, rejecting the argument that the right to be present is absolute, held that the right of personally confronting witnesses may be lost by consent or at times even misconduct. Expanding this holding the *Lynch v. Baxley* court held that the right to be present may be knowingly and intelligently waived by persons faced with involuntary commitment or by adversary counsel acting in their behalf. This procedure protects such persons' constitutional right to be present and to assist in protecting their interests, yet it recognizes that situations exist where the absence of such persons from commitment proceedings may serve their own best interests.

We adopt the *Lynch v. Baxley* procedure as appropriate for plaintiffs. Accordingly, we find that a child

has a constitutional right to be present at all hearings concerning his proposed commitment. See, *McKiever v. Pennsylvania*, 403 U.S. 528, 543 (1971). This right may be waived by the child, however, and the unbiased tribunal may accept such a waiver upon approval by the child's counsel and upon a finding that the child understands his rights and is competent to waive them. This right may also be waived by the child's attorney, and the unbiased tribunal may accept the waiver upon a finding that the child is too ill to attend the proceedings. See, *Lynch v. Baxley,* at 394.

RIGHT TO JURY TRIAL

The Supreme Court in *McKiever v. Pennsylvania, supra,* noting that conscientious judges are able fact finders, held that while fundamental fairness requires notice, the rights to counsel, confrontation, and cross-examination, and notice of standard of proof, it does not require jury trials. We agree.

STANDARD OF PROOF

That the fact finder may commit error is a risk of any litigation. *Speiser v. Randall,* 357 U.S. 513, 525-26 (1958). The standard of proof affects this risk for it instructs the fact finder on the degree of confidence society expects him to have in the correctness of his findings. See Mr. Justice Harlan concurring in *In re Winship,* 397 U.S. 358, 370-71 (1969). In *Winship,* Justice Harlan suggests that setting the standard of proof for a particular category of adjudication reflects an assessment of the com-

parative social costs of erroneous factual determinations. He views the decision to apply a preponderance standard to suits between private parties for money damages as a decision that an erroneous verdict is no more serious for one party than for the other. He finds the standard of proof beyond a reasonable doubt required in the institutionalization of a child for delinquency because the social disutility of committing an innocent child—subjecting him to a complete loss of his personal liberty—outweighs the social disutility of committing error in his favor.[21]

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[21] Mr. Justice Harlan recognizes that in a judicial proceeding in which there is a dispute about the facts, all the fact finder can acquire is a belief of what probably happened. Mr. Justice White in *Goss v. Lopez*, 419 U.S. 565, 580 (1975) also recognized the possibilities of error when he noted that:

> Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

In discussing the possibilities of erroneous psychiatric diagnoses Rosenhan, in "On Being Sane in Insane Places," *supra*, raises several poignant questions which illustrate some of the problems in this area including:

> How many people, one wonders, are sane but not recognized as such in our psychiatric institutions? How many have been needlessly stripped of their privileges of citizenship, from the right to vote and drive to that of handling their own accounts? How many have feigned insanity in order to avoid the criminal consequences of their behavior, and, conversely, how many would rather stand trial than live indeterminably in a psychiatric hospital—but are wrongly thought to be mentally ill? How many have been stigmatized by well-intentioned but nevertheless erroneous diagnoses? On the last point recall again that a "type 2 error" in psychiatric diagnosis does not have the same consequences it does in medical diagnosis. A diagnosis of cancer that has been found to be in error is cause for celebration. But psychiatric diagnoses are rarely found to be in error. The label sticks, a mark of inadequacy forever.

These problems are similar to the problems discussed by Mr. Justice Harlan in *Winship* and Mr. Justice White in *Goss v. Lopez*.

Following this analysis, balancing the impact of an erroneous decision to commit a person with an erroneous decision to release a person, and taking into consideration the nature of the proceedings, the *Lynch v. Baxley* court held:

> Because the stigmatization and loss of liberty attendant upon forced confinement are of the most profound consequence to the individual affected, due process demands that he be subjected to such disabilities only if the necessity for his commitment is proved by evidence having the highest degree of certitude reasonably attainable in view of the nature of the matter at issue. In a civil commitment proceeding, the questions involved are the primarily subjective ones of the subject's mental condition and the likelihood that he will be dangerous in the future. Such subjective determinations cannot ordinarily be made with the same degree of certainty that might be achieved where purely objective facts and occurrences are at issue. Consequently, the trier of fact must be persuaded by clear, unequivocal, and convincing evidence that the subject of the hearing is in need of confinement under the minimum standards for commitment herein enumerated.

We agree with this holding and find that the fact finder, in a hearing on commitment of a child, must apply the standard of clear and convincing proof as opposed to the

standards of beyond a reasonable doubt and preponderance of the evidence. Applying a preponderance standard creates too great a risk of erroneous commitment, wrongfully depriving a child of his interest in liberty, and interest of "transcending value,"[22] and, given the subjectivity and "relatively undeveloped state of psychiatry as a predictive science,"[23] requiring proof beyond a reasonable doubt creates too great a risk of erroneously releasing children in need of institutionalization.

RIGHTS AT THE COMMITMENT HEARING

Due process requires that before a decision to commit, an adult be given the opportunity to confront and to cross-examine witnesses against him, *Specht v. Patterson,* 386 U.S. at 610; *Lynch v. Baxley* at 394, offer evidence in his own behalf, *Specht v. Patterson* at 610, and offer testimony of witnesses, *Lynch v. Baxley* at 394, citing *White v. Texas,* 388 U.S. 14, 19 (1967).[24] While formalizing

[22] *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

[23] Note, Developments in the Law, Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1302 (1974).

[24] In *Morrissey v. Brewer, supra,* the Supreme Court held that due process requires certain minimum procedures before parole can finally be revoked. These procedures include the opportunity to be heard in person and to present witnesses and documentary evidence, and the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation). Noting that these procedures are essential in criminal trials, where a person may be subjected to the most serious deprivation, and cases where a person may lose his job in society, the Supreme Court in *Wolff, supra,* held that because of the unique problems of penal institutions the determination of whether prisoners are entitled to these rights is best left to the discretion of the officials of the prisons.

commitment procedures, these rights do not require the state to abandon the substantive benefits it presently hopes to achieve through treatment and rehabilitation. We commend the steps the state has taken in the interest of the mental health of children in need of institutionalization but, because of the tremendous personal as well as societal loss error might cause, we find that in addition to the rights previously discussed, the rights to confront and to cross-examine witnesses against him, to offer evidence in his own behalf and to offer testimony of witnesses are required before a decision to commit a child is made.[25]

To summarize, then, we have found that before they may be institutionalized plaintiffs and others of their class are entitled to (1) a probable cause hearing within seventy-two (72) hours from the date of their initial detention; (2) a post-commitment hearing within two (2) weeks from the date of their initial detention; (3) written notice, including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment; (4) counsel at all significant stages of the commitment process and if indigent the right to appointment of free counsel; (5) be present at all hearings concerning their proposed commitment; (6) a finding by clear and convincing proof that they are in need of institutionaliza-

[25] In support of their position plaintiffs submitted memoranda of law outlining the substantial procedural safeguards which they contend they are being denied. They briefly mention the contention that plaintiffs should have the right to remain silent. Against this claim we must balance the practical problems plaintiffs' silence may have on psychiatric evaluation almost always needed before plaintiffs may be institutionalized. In view of these potential problems and the limited discussion of the issue in this case we think that it would be inappropriate to decide this issue at this time.

tion; (7) the rights to confront and to cross-examine witnesses against them, to offer evidence in their own behalf, and to offer testimony of witnesses.[26] Accordingly, we declare the pertinent portions of Sections 402 and 403 unconstitutional on their face and as they apply to plaintiffs and others of their class, and we enjoin the enforcement of such portions.[27]

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[26] We neither intend nor expect that all of these procedures will be required every time an attempt to institutionalize a child is made. As we found with respect to the right of the child to be present at all hearings concerning his proposed commitment, we find that, excepting the right to notice and counsel, any or all of these rights may be waived by the child and the unbiased tribunal may accept such a waiver upon approval by the child's counsel and upon a finding that the child understands his rights and is competent to waive them. Because there may be situations where the child either does not understand his rights or is not competent to waive them, any or all of these rights may also be waived by the child's attorney and the unbiased tribunal may accept the waiver upon a finding that the waiver is appropriate.

[27] Some courts have approached claims by children of constitutional deprivation by comparing the rights afforded adults with the rights afforded children and questioning whether there is a peculiar state interest justifying any disparity between them. See *State v. Koome*, 530 P. 2d 260 (Wash. 1975). Authority for such an approach can be gleaned from the Supreme Court's statement in *In re Gault*, at 29, that "So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliche can provide." Since we dispose of this case under the Due Process Clause we have no occasion to address the equal protection arguments directed at the disparate treatment of children and adults.

Plaintiffs also claim they are being denied equal protection of the law since persons above the age of eighteen (18) may voluntarily admit or commit themselves to mental institutions and persons eighteen (18) years of age or younger may not. Plaintiffs, however, failed to allege that any of the named plaintiffs ever attempted voluntarily to admit or commit themselves or even that they wish to. Accordingly, we find that plaintiffs lack standing to present this claim.

The foregoing is deemed to constitute findings of fact and conclusions of law as required by F.R. Civ. P. 52 (a).

(s) John J. Gibbons,
John J. Gibbons, *C. J.*
(s) Daniel H. Huyett, 3rd,
Daniel H. Huyett, 3rd, *D. J.*

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley, et al.

vs.

Jack B. Kremens, individually and as Hospital Director of Haverford State Hospital, et al.

ORDER

NOW, July 24, 1975, IT IS ORDERED that judgment is entered in favor of plaintiffs and against defendants. Counsel for the parties shall confer and submit an appropriate form of Order consistent with this Opinion within twenty (20) days.

(s) John J. Gibbons,
John J. Gibbons, *C. J.*
(s) Daniel H. Huyett, 3rd,
Daniel H. Huyett, 3rd, *D. J.*

Re: Kevin Bartley, et al. v. Jack B. Kremens, et al. Civil
Action No. 72-2272

BRODERICK, D.J., *dissenting.*

It appears to me that the majority opinion has prescribed "an overdose" of due process which could prove fatal to the voluntary commitment of children for in-patient treatment for mental or emotional disorders. The majority opinion declares unconstitutional §§402 and 403 of the Pennsylvania Mental Health and Mental Retardation Act which provides that parents may make application for voluntary admission and commitment of their child age 18 or younger to a facility for examination, treatment and care. The due process procedure prescribed by the majority opinion for all voluntary admissions and commitments of juveniles 18 years of age and younger is as follows: (1) a probable cause hearing within 72 hours from the time of their initial detention; (2) a post-commitment hearing within 2 weeks of their initial detention; (3) written notice to the child stating the time and place of the hearing and the grounds for the proposed commitment. The notice must also be sent to the child's attorney; (4) counsel at all significant stages of the commitment process and, if indigent, the right to the appointment of free counsel; (5) the right of the child to be present at all hearings concerning his proposed commitment; (6) a finding, by "clear and convincing proof", that the child is in need of institutionalization; and (7) the right to confront and to cross-examine witnesses, and to offer evidence on his own behalf.

The Pennsylvania Mental Health and Mental Retardation Act and the regulations promulgated thereunder

provide for the voluntary admission[1] or commitment[2] of persons eighteen years of age or younger by a parent, guardian or individual standing in loco parentis to the person to be admitted. It is this voluntary admission or commitment procedure which the majority has declared unconstitutional. In effect, the majority has declared that no voluntary commitment of children by their parents can meet the constitutional requirements of the Fourteenth Amendment.

Under the Pennsylvania Act and regulations, application for voluntary admission or commitment[3] to a facility may be made by a parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years or younger.[4] In order to be admitted or committed to an institution, any person aged 18 and younger must first be referred from a recognized medical facility, Mental Health/Mental Retardation therapist or Mental Health Agency. Such referral must be accomplished by a psychiatric evaluation and a report which states with specificity the reasons that the child requires institutional care. After such referral, the director of the facility to which the parents seek to have their child admitted must then conduct an independent examination

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[1] 50 P.S. §4402(a)(2).

[2] 50 P.S. §4403(a)(2).

[3] The legislature chose to pass two distinct statutes, one of which deals with voluntary admissions to a facility while the other is concerned with voluntary commitments. Apparently, the main distinction in the two statutes is that under the later section dealing with voluntary commitments, the initial commitment is for a period not to exceed thirty days, with successive periods not to exceed thirty days each, so long as care or observation is necessary. The section providing for voluntary admissions contains no corresponding time limitation following admission to a facility.

[4] 50 P.S. §4402(a)(2); 50 P.S. §4403(a)(2).

of the child in order to determine whether the child is in need of institutional care or observation. If the director's independent examination disagrees with the referring professional's opinion, the child cannot be institutionalized. In the case of a voluntary commitment under §403 of the Act, an acceptance for commitment may not exceed thirty days without a successive application for continued voluntary commitment for an additional thirty day period.[6] In the case of juveniles 13 years of age and older, within 24 hours of admission to the institution, the juvenile must be given written notification which he signs and which is to be fully explained to him and which states that he will be furnished with counsel to represent him. Should a juvenile who is 13 years of age or older object, either orally or in writing, to remaining in the institution, the director, if he feels it is necessary for the youth to remain, may continue the institutionalization for two business days, during which time notification shall be made to the applicant and the referral unit so that either party may institute a §406 proceeding, which is the statutorily required court hearing for an involuntary commitment. During that same two day period, the director must obtain counsel to represent the juvenile. The juvenile's counsel is then furnished with the evaluation of the juvenile by the referral unit, a psychiatric evaluation from the institution, and a written report of the reasons that the institution feels that institutionalization is required.[7]

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[5] 50 P.S. §4402(b); 50 P.S. §4403(b). [No corresponding text citation]

[6] 50 P.S. §4403(b).

[7] I agree with the majority that these regulations which provide for instituting a §406 hearing do not provide for a period within which such a hearing shall be held following the objection of the child to remaining in the institution.

The effect of the Act and the regulations promulgated thereunder is that two independent medical opinions must concur in a recommendation of institutionalization before a minor can be voluntarily admitted. In the case of juveniles 13 and over, upon their objection to remaining in the institution, future institutionalization must proceed pursuant to the civil court commitment provisions of the Act (Section 406). Section 406 provides the procedure for an involuntary civil court commitment and requires the filing of a petition with the Court of Common Pleas, pursuant to which the Court issues a warrant requiring the allegedly ill person to be brought to Court for a hearing. Counsel appointed for the juvenile represents him at the hearing before the Court of Common Pleas. After the hearing, the Court may order an examination by two physicians or order commitment for a period not to exceed ten days for an examination, after which commitment may be ordered by the Court. Plaintiffs do not attack the constitutionality of the civil court commitments under §406 of the Act which follow the above outlined procedure.

I do not take the position that children have no rights. I simply feel that the procedures outlined by the Pennsylvania Legislature, when balanced against the traditional rights of parents to control the rearing of their children, afford sufficient protection to the child. The present Act does not permit a parent who seeks to admit a child under §402 or §403 to simply hand over the child to the institution. Two psychiatrists must agree, after an examination, that the child is in need of institutionalization. In the case of a voluntary commitment, a periodic review must be performed by the director every thirty days to determine whether continued institutionalization is necessary. And in the case of a juvenile thirteen years

of age and older, the juvenile is entitled to a hearing with counsel concerning his need for institutionalization following his objection. The majority in this case holds that all children are constitutionally entitled to a similar type of hearing within two weeks of their institutionalization. The only group for which the present regulations have not provided a hearing subsequent to their being received in the institution are those children 12 years of age and under. Because of this alleged defect, the majority declares §402 and §403 unconstitutional.

It is now a well settled principle that "due process 'is an elusive concept', the content of which 'varies according to specific factual contexts.'" *Hannah v. Larche,* 363 U.S. 420, 442 (1960); *Logan v. Arafeh,* 346 F. Supp. 1265, 1268 (D. Conn. 1972).

> [C]onsideration for which procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by government action. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U. S. 886, 895 (1961).

Due process of law does not require a hearing in every conceivable case of government impairment of private interest. *Stanley v. Illinois,* 405 U. S. 695 (1972).

An evaluation of the competing interest involved in this case leads me to the conclusion that §402 and §403 of the Act and the regulations thereunder are constitutional on their face. Without minimizing the interest of a child

12 years and under to be free from a wrongful and unwarranted deprivation of his liberty, the traditional interest of the state in preserving the family unit and in maintaining parental control over their young children is such that the strict procedural due process requirements imposed by the majority holding as to "voluntary" commitments are not required by the Fourteenth Amendment.

The Supreme Court has repeatedly recognized and afforded great weight to the rights of parental control and custody of their children and has given due respect to the powerful role of the familial relationship in our democratic society. This substantial interest of parents undeniably warrants deference and, absent a powerful countervailing interest, warrants protection. It is plain that the interest of family integrity and the interests of parents in the care, custody and nurture of their children come to the court with a momentum deserving of respect. *Kovacs v. Cooper,* 336 U. S. 77, 95 (1949) (Frankfurter, J., concurring).

As the Supreme Court stated in *Stanley v. Illinois,* 405 U. S. 645, 651 (1972):

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U. S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942), and "[r]ights far more previous . . . than property rights," May v. Anderson, 345 U. S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221 (1953). "It is cardinal with

> us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U. S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, *supra,* 262 U. S. at 399, 43 S. Ct. at 626, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, *supra,* 316 U. S., at 541, 62 S. Ct. at 1113, and the Ninth Amendment, Griswold v. Connecticut, 381 U. S. 479, 496, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (Goldberg, J., concurring).

The authorities cited above make it clear that the parents' interest in directing the upbringing of their children is cognizable and substantial. *Stanley, supra* at 652. Those who nurture the child and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations. *Pierce v. Society of the Sisters of the Holy Names, etc.,* 268 U. S. 510, 535 (1925). The parents' claim to authority in their own household to direct the rearing of their children has been termed "basic to the structure of our society." *Ginsberg v. State of New York,* 390 U. S. 629, 639 (1968). In *Wisconsin v. Yoder,* 406 U. S. 205 (1972), the Supreme Court stated at 232:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

As Chief Judge Bazelon of the District of Columbia Court of Appeals has stated:

> [T]he family is the most effective child-developing agent around, when it wants to be and can be. Out of the plethora of studies of day care and early intervention, one thing stands out: a child needs most a family—it is there that he finds his roots and his education. Mothers and fathers who spend time with their child are better at it than are most organized group care arrangements. David L. Bazelon, *Whose Needy Children?* University of Michigan Journal of Law Reform, vol. 8, 247.

Simply stated, it is my opinion that the present Act and the regulations thereunder which require two independent psychiatric evaluations recommending institutionalization before a parent can voluntarily have his child admitted for treatment or observation provides sufficient protection to the child against an unwarranted or unjustified institutionalization.

The record in this case demonstrates that most parents act in the best interests of their child when making the decision to voluntarily submit their child to institutional treatment. Indeed, those parents whose motives the majority opinion questions are few and far between. Children of the age of twelve and younger are at a stage of development when parents must have direct control over their care and treatment. Parents of such young children are best able to make a determination as to their child's needs, and their decision to seek institutional care and treatment for their child comes only after all other alternatives for treatment and care have been exhausted. To pro-

tect a child from being institutionalized when not in need of such care, the State has developed a system whereby the independent judgment of two experts, trained in this difficult area, must concur with the parents' decision. [8]

As the record in this case clearly reveals, the modern trend in the treatment of the mentally and emotionally ill and the retarded is to institutionalize for the least amount of time and only when all else has failed. The majority opinion expressed concern as to the warehousing of children which might result from the voluntary commitment procedure. However, since the recent opinion of the Supreme Court in *O'Conner v. Donaldson,* 43 U.S.L.W. 4929 (1975), this fear should be dissipated by the Court's holding that a state cannot constitutionally confine a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. I find that the procedures set forth by the majority which require two hearings with counsel appointed for the child, the confrontation and cross-examination of parents and the requirement of clear and convincing proof of the need of institutional care needlessly destroys the voluntary commitment procedure without affording any significant protection for the child. The adversary nature of the procedure which the

[8] I am aware that courts in Nebraska and Tennessee have declared unconstitutional statutes which permit the voluntary institutionalization of children. *Horacek, etc. v. Exon, et al.,* Civil Action No. 74-L-299 (D.C. Neb. 1974). *Saville v. Treadway,* Civil Action No. 6969 (M.D. Tenn. 1974). However, it is not apparent from reading the opinions in those cases whether both Nebraska and Tennessee provide a protective procedure similar to those provided for under the Pennsylvania statute and regulations.

majority requires will significantly increase the trauma which accompanies the institutionalization of sick children and will further serve to stigmatize the recipient of the court endorsed commitment. In my opinion, it retards society's progress of recent years in encouraging parents to seek treatment and care of a child in need of hospitalization for a mental or emotional disorder. It will likewise retard society's progress toward removing the stigma still associated by some with psychiatric care. The majority opinion discusses "the stigma associated with civil commitment", yet sets up a system which makes civil commitment necessary. For years now, responsible leaders have been counseling the public that treatment for mental and emotional disorders should be as readily available and as readily acceptable as hospitalization for a tonsillectomy or appendectomy. It certainly will not encourage parents to seek hospitalization for a mentally or emotionally disturbed child when the parent learns that counsel will be appointed for the child and that there will be an adversary hearing at which parents will be subjected to cross-examination as to their motives for seeking hospitalization.

PLAINTIFFS' PROPOSED ORDER—AUGUST 5, 1975

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-2272

Kevin Bartley, et al., by their guardian ad litem, David Ferleger, Esquire,

Plaintiffs

v.

Jack B. Kremens, individually and as Hospital Director of Haverford State Hospital, et al.,

Defendants

ORDER OF JUDGMENT

The opinion in this case was released July 24, 1975 along with our order granting judgment in favor of plaintiffs and against defendants. Pursuant to Rules 58 and 65 (d) of the Federal Rules of Civil Procedure, the following order is hereby entered to provide the declaratory and injunctive relief to which the Court in its opinion held plaintiffs entitled and to implement said opinion:

It is ordered that final judgment in favor of all plaintiffs and the class they represent and against defendants Jack B. Kremens, M.D., individually and as Hospital Director of Haverford State Hospital; Helene Wohlgemuth, individually and as Secretary of the Department of Public

Welfare of Pennsylvania; William B. Beach, Deputy Secretary of Mental Health and Mental Retardation, and their officers, agents, employees, servants and their successors and those acting in active concert or participation with them, is hereby granted and ordered entered as follows:

CLASS ACTION

1. This action is properly maintained as a class action under Fed. R. Civ. P. 23 (b) (2). The class represented by the named plaintiffs are all persons eighteen years of age or younger who have been, are, or may be admitted or committed to mental health facilities in Pennsylvania under the Pennsylvania Mental Health and Mental Retardation Act of 1966 (hereafter, "Act"). 50 P.S. §§4402 and 4403 (§§402 and 403). In this order, the class or its members are occasionally referred to as "child-(ren)", "juvenile (s)" or "subject (s) of the proceeding (s)".

DECLARATORY JUDGMENT

2. The Pennsylvania civil commitment statutes contained at 50 P.S. §§4402 (a) (2) and 4403 (a) (2) are hereby declared to be unconstitutional on their face and as applied under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. The Pennsylvania civil commitment statute contained at 50 P.S. §4402 (c) is hereby declared to be unconstitutional on its face and as applied under the Due Process Clause of the Fourteenth Amendment to the United States

Constitution, except for the phrase in that statute, "any person voluntarily committed shall be free to withdraw at any time."

Notice

4. The above statutes are declared invalid in that they fail to require that members of the class receive written advance notice of the date, time and place of the hearings on a proposed commitment, along with a statement of the grounds for the proposed commitment. In addition, it is declared that the child's attorney must be in receipt of this notice at least forty-eight (48) hours prior to the initial hearing.

5. Until such time as some other proper procedure is established by the legislature in accordance with this Court's opinion and order, it is declared that this notice (in addition to the requirements of Paragraph 4 above) must be sent not only to the child but also to the Clerk of the Court with jurisdiction and must be forwarded to the child's attorney.

Counsel

6. The above statutes are declared invalid in that they fail to require counsel for the child and, if indigent, appointment of free counsel, during all significant stages of the commitment process.

Presence of Person

7. The above statutes are declared invalid in that they fail to require for persons subject to the proceedings the right to presence with counsel, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, opportunity to offer evidence on their own behalf and to offer the testimony of witnesses.

Standard of Proof

8. The above statutes are declared invalid in that they fail to require that the fact finder, in a hearing on commitment of a juvenile, must find by clear and convincing proof that the subject is in need of institutionalization.

Probable Cause Hearing

9. The above statutes are declared invalid in that they permit detention of members of the class for periods in excess of seventy-two (72) hours without a hearing to test whether there is probable cause to believe institutionalization is necessary. It is further declared that in no event shall detention of the child in the absence of a probable cause hearing exceed seventy-two (72) hours from the date of the initial detention.

10. The above statutes are declared invalid in that they fail to provide at a probable cause hearing the rights described in Paragraphs 4 through 8 above and in Paragraph 18 below.

Commitment Hearing

11. The above statutes are declared invalid in that they fail to require that, if the conclusion of the probable cause hearing is that there is probable cause for believing the child needs institutionalization, the child is entitled to a full hearing on the need for commitment. It is further declared that this hearing must be held within two (2) weeks from the date of the initial detention. In no event shall detention of the child in the absence of this full hearing exceed two (2) weeks from the date of the initial detention.

12. The above statutes are declared to be invalid in that they fail to provide at this commitment hearing the rights described in Paragraphs 4 through 8 above and in Paragraph 18 below.

Regulations

13. The regulations promulgated by Defendant Wohlgemuth with regard to §§402 and 403, published at 3 Pa. Bull. 1840, are hereby declared invalid and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they fail to require for all members of the class the rights described in Paragraphs 4 through 12 above and in Paragraph 18 below.

Named Plaintiffs' and Class Members' Commitments and Admissions

14. It is hereby declared that the commitments and admissions of the named plaintiffs to Haverford State Hospital, accepted by Defendant Kremens, are unconstitutional, void and invalid.

15. It is hereby declared that the unnamed plaintiffs, all persons eighteen years of age or younger admitted or committed to mental health facilities in Pennsylvania under §§402 and 403 of the Act, are unconstitutionally held and detained.

Use of State Courts

16. Until the legislature acts to establish an unbiased tribunal to conduct the probable cause and final hearings as required by the opinion and order herein, it is hereby declared that the present facilities of the Commonwealth court system must be used for these hearings.

Application for Treatment for Juveniles

17. It is hereby declared that a parent, guardian or individual standing in loco parentis may temporarily detain a class member in a mental health facility if the procedures and requirements of this order and opinion are fully complied with. See especially Paragraphs 2 through 12 and 18.

Requirements for Commitment

18. It is hereby declared that all members of the class who have been, are or may be subject to admission or commitment are entitled to:

Notice

A. Written advance notice of the date, time and place of the hearings on a proposed commitment, along with a statement of the grounds for the proposed commitment. In addition, the child's attorney must be in receipt of this notice at least forty-eight (48) hours prior to the initial hearing.

B. Until some other proper procedure is established by the legislature in accordance with this Court's opinion and order, this notice must be sent not only to the child but also to the Clerk of the Court with jurisdiction and must be forwarded to the child's attorney.

Counsel

C. Counsel and, if indigent, appointment of free counsel, during all significant stages of the commitment process.

Presence of Person, Other Hearing Rights

D. Presence of the person subject to the proceedings, with counsel, an opportunity to be heard, confrontation

and cross-examination of adverse witnesses, opportunity to offer evidence on their own behalf and to offer the testimony of witnesses.

Standard of Proof

E. A finding by clear and convincing proof that the subject is in need of institutionalization.

Probable Cause Hearing

F. A hearing within seventy-two (72) hours from the date of the initial detention to test whether there is probable cause to believe that institutionalization is necessary.

Commitment Hearing

G. A full hearing within two (2) weeks from the date of the initial detention.

INJUNCTIVE RELIEF

19. It is further ordered that the defendants and their officers, agents, servants, employees, successors and those persons in active concert or participation with them are hereby enjoined:

Procedures

A. To refrain from accepting or continuing the admission or commitment of any member of the class to any mental health facility unless such person is or has been provided:

1) Written advance notice of the date, time and place of the hearings on a proposed commitment, along with a statement of the grounds for the proposed commitment. In addition, the child's attorney must be in receipt of this notice at least forty-eight (48) hours prior to the initial hearing.

2) Until some other proper procedure is established by the legislature in accordance with this Court's opinion, this notice must be sent not only to the child but also to the Clerk of the Court with jurisdiction and must be forwarded to the child's attorney.

3) Counsel and, if indigent, appointment of free counsel, during all significant stages of the commitment process.

4) Presence of the person subject to the proceedings, with counsel, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, opportunity to offer evidence on their own behalf and to offer the testimony of witnesses.

5) A finding by clear and convincing proof that the subject is in need of institutionalization.

6) A hearing within seventy-two (72) hours from the date of the initial detention to test whether there is probable cause to believe institutionalization is necessary. In no event shall defendants detain the child in the absence of a probable cause hearing longer than seventy-two (72) hours from the date of the initial detention.

7) A full hearing within two (2) weeks from the date of the initial detention. In no event shall defendants detain the child in the absence of the full hearing longer than two (2) weeks from the date of the initial detention.

Regulations

B. To promulgate and issue regulations and to publish them within two weeks, as immediately effective, which regulations shall require that all mental health facilities in Pennsylvania (see 50 P.S. §4102 for definition of "facility") adhere to the opinion and order in this case.

Notice of Order

C. To give personal notice of this Court's opinion and order to all state school and mental hospital directors and their delegates, and to the directors of all other mental health facilities in Pennsylvania.

Access for Attorneys

D. To provide access by attorneys to the grounds and facilities of all mental hospitals and institutions, to their individual clients and to the institutional and hospital records pertaining to their clients' commitments.

Procedures for Present Class Members

E. To initiate procedures, commencing immediately, which shall assure that all members of the class committed or admitted pursuant to §§402 and 403 are either discharged or released pursuant to the opinion and order herein or are recommitted according to the procedures required by the opinion and order herein. Such discharge, release or recommitment shall begin immediately, shall continue and shall be concluded within forty-five (45) days of this order. Notation shall be made upon the medical records of such members of the class that their discharge, release or recommitment was pursuant to the opinion and order in this case.

Reports on Implementation

F. To report to the Court within thirty (30) days, and again within sixty (60) days regarding the steps taken and progress made in the implementation of this opinion and order and certifying that the required notice, publication and other steps have been accomplished and in what manner. The sixty (60) day report shall describe, for each mental health facility, the number of class members released, discharged or recommitted.

G. To pay to plaintiffs' counsel the costs herein which shall be taxed in accordance with Rule 54 F.R. Civ. P.

By the Court:

_____

_____

_____

DEFENDANTS' PROPOSED ORDER—AUGUST 21, 1975

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley, et al.

v.

Jack B. Kremens, individually and as Hospital Director of Haverford State Hospital, et al.

FINAL ORDER

AND NOW, this day of , 1975 and, in accordance with the Opinion issued on July 24, 1975, this court enters this final order.

CLASS ACTION

1. This action shall be maintained as a class action, pursuant to F.R.C.P. 23 (b) (2). The class represented by the plaintiffs are all persons eighteen years of age or younger (sometimes referred to as "juveniles") who have been, are, or may be admitted or committed to mental health facilities in Pennsylvania pursuant to and under the authority of the Pennsylvania Mental Health and Mental Retardation Act of 1966 and more specifically sections 402 and 403 thereof, 50 P.S. §§4402 and 4403.

DECLARATORY JUDGMENT

2. Sections 402 (a) (2), 402 (c) except the phrase "any person voluntarily committed shall be free to withdraw at any time", and 403 (a) (2) of the Mental Health and Mental Retardation Act of 1966, 50 P.S. §§4402 (a) (2), 4402 (c) except the phrase "any person voluntarily committed shall be free to withdraw at anytime", and 4403 (a) (2), are hereby declared to be repugnant to the Constitution of the United States and more particularly the Due Process Clause of the Fourteenth Amendment thereof.

INJUNCTION

3. Except as provided in Paragraph 4, hereof, defendants shall be and are hereby enjoined and restrained from admitting or committing any person eighteen years of age or younger pursuant to or under the authority of those proportions of the Pennsylvania Mental Health and Mental Retardation Act of 1966 which have herein been declared unconstitutional.

EQUITABLE RELIEF

4. In order to protect the rights of the classes of plaintiffs and in order to give the Generai Assembly of the Commonwealth of Pennsylvania time to determine whether new legislation shall be enacted and to determine the particulars of such new legislation and in order to equitably adjust the rights and interests of the parties in light of the immediate effect of our opinion and order and in order to insure that persons eighteen years of age and younger who desire to or need to be committed to mental

health facilities in Pennsylvania, paragraph 3 of this order is hereby stayed for a period of 180 days from the date of this order or until new legislation is enacted by the Pennsylvania General Assembly, which ever occurs first, provided however, that defendants shall be and are enjoined and restrained from accepting for admission or commitment any person eighteen years of age or younger unless the following procedural safeguards are afforded:

PROBABLE CAUSE HEARING

a. Within seventy two (72) hours[1] after the admission of a person eighteen years of age or younger a probable cause hearing, before a Court of Common Pleas, shall be held. The Court may appoint masters for the hearing in determination of such matters. The hearing judge or master shall determine, from the evidence presented that the moving party has made a prima facie showing that the juvenile is mentally ill or mentally retarded and is in need of institutionalization.

POST COMMITMENT HEARING

b. Within two weeks of the admission or commitment of a person eighteen years or younger a post-commitment hearing before a Court of Common Pleas shall be held. The Court may appoint masters for the hearing and determination of such matters. The

[1] As to admissions or commitments made on Thursday, the probable cause hearing shall be held no later than the next Monday; as to admissions or commitments made on Friday, the probable cause hearing shall be held no later than the next Tuesday; as to admissions or commitments made on a Saturday or Sunday, a probable cause hearing shall be held no later than the next Wednesday.

hearing judge or master shall determine from the evidence presented, that the moving party, by clear and convincing proof that the moving party has shown that the juvenile is mentally ill or mentally retarded and is in need of institutionalization.

COUNSEL

c. The juvenile shall be entitled to counsel at both the Probable Cause Hearing and the Post-Commitment Hearing, if indigent, the Court shall appoint counsel. The Court may, if a parent or the parents or moving party are not indigent assess counsel fees against them or any of them as justice may require. The Court may appoint the public defender, legal services organization or legal aid office as counsel for the juvenile.

NOTICE

d. Within 48 hours prior to the Post Commitment Hearing the moving party shall actually serve a notice upon, the juvenile and the clerk of court or if the juvenile is represented by counsel, such counsel. The notice shall contain the following:

1. Date, time and place of hearing

2. Statement of the grounds for the proposed commitment.

PRESENCE

e. Juveniles have the right to be present at all hearings concerning their proposed commitment. A juvenile may waive such rights.

f. Except as to the right of notice and the right of counsel, all rights set forth in Paragraph 4 hereof may be waived by the juvenile and the judge or master

may accept such a waiver upon approval by the child's counsel and upon a finding that the child understands his rights and is competent to waive them.

g. Except as to the right of notice and the right to counsel, all of the rights set forth in Paragraph 4 hereof may also be waived by the juveniles' counsel and the judge or master may accept the waiver upon a finding that the waiver is appropriate under the circumstances of the case.

DISTRIBUTION

5. The Clerk of this Court shall distribute to all judges of the Courts of Common Pleas in Pennsylvania a copy of the opinions of this Court and this Order under cover of a letter of the Clerk.

6. The Clerk of this Court shall distribute to all members of the Pennsylvania General Assembly a copy of the opinions of this Court and this order under cover of a letter of the Clerk.

John J. Gibbons *C.J.*

Daniel H. Huyett, III *J.*

COURT'S PROPOSED ORDER—SEPTEMBER 16, 1975

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley, et al.

vs.

Jack B. Kremens, Individually and as Hospital Director of Haverford State Hospital, et al.

ORDER

Before Honorable John J. Gibbons, Circuit Judge, and Honorable Daniel H. Huyett, 3rd, and Honorable Raymond J. Broderick, District Judges

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HUYETT, J. September , 1975

On July 24, 1975, we filed our opinion and order in this action granting judgment in favor of plaintiffs and against defendants. Pursuant to Fed. R. Civ. P. 58 and 65 (d), we now enter the following Order to provide and implement the declaratory and injunctive relief to which we held plaintiffs entitled in our opinion.

CLASS ACTION

1. This action is properly maintained as a class action under Fed. R. Civ. P. 23(b)(2). The class represented by the named plaintiffs includes all children eighteen years of age or younger who have been, are, or may be admitted or committed to mental health facilities in Pennsylvania under the Pennsylvania Mental Health and Mental Retardation Act of 1966. 50 P.S. §§4402 and 4403 (§§402 and 403).

DECLARATORY JUDGMENT

2. Section 402(a)(2), section 402(c), except for the language "any person voluntarily admitted shall be free to withdraw at any time," and section 403(a)(2) of the Pennsylvania Mental Health and Mental Retardation Act (Act) are declared to be unconstitutional on their face and as applied under the due process clause of the Fourteenth Amendment to the United States Constitution.

Notice

3. These sections of the Act are declared invalid in that they fail to require that children eighteen years of age or younger receive prior written notice of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the child's attorney must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the legislature establishes some other procedure consonant with our opinion and order, it is declared that this notice must be sent not only to the child but also the Clerk of the Court with jurisdiction to be forwarded to the child's attorney.

Counsel

4. These sections of the Act are declared invalid in that they fail to require during all significant stages of the commitment process counsel for children eighteen years of age or younger and, if the child is indigent, appointment of free counsel.

Presence of Child

5. These sections of the Act are declared invalid in that they fail to afford to children eighteen years of age or younger subject to commitment hearings the rights to presence with counsel, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and the opportunity to offer the testimony of witnesses and other evidence on their own behalf.

Standard of Proof

6. These sections of the Act are declared invalid in that they fail to require that the fact finder in a full hearing on the commitment of a child eighteen years of age or younger find by clear and convincing proof that the child is in need of institutionalization.

Probable Cause Hearing

7. These sections of the Act are declared invalid in that they permit detention of children eighteen years of age or younger for more than seventy-two (72) hours without a hearing to test whether there is probable cause to believe institutionalization is necessary. These sections of the Act are further declared invalid in that they fail to provide at a probable cause hearing the rights delineated in paragraphs 3 through 5 above.

Full Commitment Hearing

8. These sections of the Act are declared invalid in that in the event the initial hearing determines the existence of probable cause, they fail to afford to children eighteen years of age or younger a full hearing on the need for commitment within two weeks from the date of initial detention. These sections of the Act are further declared invalid in that they fail to provide at a full commitment hearing the rights delineated in paragraphs 3 through 6 above.

Regulations

9. The regulations promulgated by defendant Wohlgemuth to supplement these sections of the Act, published at 3 Pa. Bull. 1840, are declared invalid and in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that they fail to require for all children eighteen years of age or younger the rights delineated in paragraphs 3 through 8 above.

Admissions and Commitments of Plaintiffs

10. It is declared that all children eighteen years of age or younger admitted or committed to mental health facilities in Pennsylvania under these sections of the Act are unconstitutionally held and detained.

Use of State Courts

11. Until the legislature establishes in accord with our opinion and orders an alternate neutral tribunal to conduct the probable cause and full commitment hearings, it is declared that the present facilities of the Commonwealth court system be used for these hearings.

Application for Treatment of Juveniles

12. It is declared that a parent, guardian, or person standing in loco parentis may initiate the temporary detention of a child eighteen years of age or younger in a mental health facility if the procedures and requirements of our opinion and order are fully complied with.

Requirements for Commitment

13. It is declared that all children eighteen years of age or younger who have been, are, or may be subject to admission or commission to a mental health facility in Pennsylvania are entitled to:

Notice

A. Prior written notice of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the child's attorney must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the legislature establishes some other procedure consonant with our opinion and order, this notice must be sent not only to the child but also to the Clerk of the Court with jurisdiction to be forwarded to the child's attorney.

Counsel

B. Counsel during all significant stages of the commitment process and, if the child is indigent, appointment of free counsel.

Presence of Child and Other Hearing Rights

C. Presence of the child at all commitment hearings, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and an opportunity to offer testimony of witnesses and other evidence on the child's behalf.

Standard of Proof

D. A finding by clear and convincing proof at the full commitment hearing that the child is in need of institutionalization.

Probable Cause Hearing

E. A hearing within seventy-two (72) hours from the date of the initial detention to test whether or not there is probable cause to believe that institutionalization is necessary.

Full Commitment Hearing

F. A full commitment hearing within two (2) weeks from the date of the initial detention.

Waiver

14. Excepting the rights to notice and counsel, any or all of the rights delineated in paragraph 13 may be waived by the child, and the neutral tribunal may accept such a waiver upon approval by the child's counsel and upon a finding that the child understands his rights and is competent to waive them. Because there may be situations where the child either does not understand his rights or is not competent to waive them, any or all of these rights, excepting notice and counsel, may also be waived by the child's attorney, and the neutral tribunal may accept the waiver upon a finding that the waiver is appropriate.

INJUNCTIVE RELIEF

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15. It is ordered that the operation of section 402 (a) (2), section 402 (c), except for the language "any person voluntarily admitted shall be free to withdraw at any

time," and section 403 (a) (2) of the Pennsylvania Mental Health and Mental Retardation Act (Act) is enjoined in that these sections of the Act are unconstitutional on their face and as applied under the due process clause of the Fourteenth Amendment to the United States Constitution. It is further ordered that the defendants and their officers, agents, servants, employees, successors, and those persons in active concert or participation with them are enjoined:

Procedures

A. To refrain from accepting or continuing the admission or commitment of any child eighteen years of age or younger under the Act to any mental health facility unless the child is or has been provided:

(1) Prior written notice of the date, time and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the child's attorney must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the legislature established some other procedure consonant with our opinion and order, this notice must be sent not only to the child but also to the Clerk of the Court with jurisdiction to be forwarded to the child's attorney.

(2) Counsel during all significant stages of the commitment process and, if the child is indigent, appointment of free counsel.

(3) Presence of the child at all commitment hearings, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and an opportunity to offer testimony of witnesses and other evidence on the child's behalf.

(4) A finding by clear and convincing proof at the full commitment hearing that the child is in need of institutionalization.

(5) A hearing within seventy-two (72) hours from the date of the initial detention to test whether or not there is probable cause to believe that institutionalization is necessary.

(6) A full commitment hearing within two (2) weeks from the date of the initial detention.

Excepting the rights to notice and counsel, any or all of the rights delineated in paragraph 15(A) may be waived by the child, and the neutral tribunal may accept such a waiver upon approval by the child's counsel and upon a finding that the child understands his rights and is competent to waive them. Because there may be situations where the child either does not understand his rights or is not competent to waive them, any or all of these rights, excepting notice and counsel, may also be waived by the child's attorney, and the neutral tribunal may accept the waiver upon a finding that the waiver is appropriate.

Regulations

B. To promulgate and issue regulations and to publish them, within thirty (30) days as immediately effective, requiring that all mental health facilities in Pennsylvania (*see* 50 P.S. §4102 for the definition of "facility") adhere to the opinion and order in this action.

Notice of Order

C. To give notice forthwith to all state school and mental hospital directors and their delegates and all

directors of all other mental health facilities in Pennsylvania of the opinion and order in this action. Further, to give notice forthwith to all judges of the Courts of Common Pleas in Pennsylvania of the opinion and order in this action.

Access for Attorneys

D. To provide to attorneys access to the grounds and facilities of all mental hospitals and institutions, to their individual clients, and to the institutional and hospital records pertaining to their clients' commitments.

Procedures for Children Already Admitted or Committed

E. To initiate procedures, commencing immediately, to assure that all children eighteen years of age or younger already admitted or committed pursuant to §§402 and 403 are either discharged or released or recommitted according to the procedures required by our opinion and order. Such discharge, release, or recommitment shall begin immediately and shall be concluded within one hundred and twenty (120) days of the date of this order. Notation shall be made upon the medical records of such children that their discharge, release, or recommitment was effected pursuant to the opinion and order in this action.

Reports on Implementation

F. To report to this Court within sixty (60) days and again within one hundred and fifty (150) days on the steps taken and progress made in the implementation of our opinion and order. The one hundred and fifty-day report shall describe, for each mental health facility, the

number of children eighteen years of age or younger released, discharged, or recommitted.

_____

C.J.

_____

D.J.

_____

D.J.

DEFENDANTS' EXCEPTIONS TO COURT'S PROPOSED ORDER—OCTOBER 17, 1975

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley, et al.,

Plaintiffs

v.

Jack B. Kremens, et al.,

Defendants

EXCEPTIONS TO PROPOSED ORDER

The Defendants by their counsel, Barry A. Roth, Assistant Attorney General, hereby take exceptions pursuant to Federal Rule of Civil Procedure 46 to the Proposed Order which was issued in the above-captioned matter on or about the 16th day of September, 1975, and make the following representations:

1. The Opinion in this matter was issued on July 24, 1975. (Exhibit A) (22a).

2. A dissenting opinion in this matter was issued on August 7, 1975. (Exhibit B) (52a).

3. Pursuant to This Honorable Court's instruction, Defendants submitted a proposed form of final order (attached hereto as Exhibit C and made a part hereof) (72a) together with an accompanying letter dated August 21, 1975 (attached hereto as Exhibit D and made a part hereof).

4. Pursuant to This Honorable Court's instruction, Plaintiffs submitted a proposed form of final order (attached hereto as Exhibit E and made a part hereof) (62a) together with an accompanying letter dated August 5, 1975 (attached hereto as Exhibit F and made a part hereof), and in addition, a response letter to Defendants' August 21, 1975 letter (see Exhibit D) (attached hereto as Exhibit G and made a part hereof).

5. This Honorable Court submitted a proposed order to all counsel of record for comment (attached hereto as Exhibit H and made a part hereof) (77a).

6. Defendants hereby propound the following exceptions to This Honorable Court's proposed order (see Exhibit H):

A. Paragraph 3 requires that a child's attorney must receive notice of the probable cause hearing or post-commitment hearing 48 hours prior to that hearing; however, there is no method by which the Commonwealth, and in particular the Pennsylvania Department of Public Welfare can even attempt to assure that an attorney who is not yet appointed or selected will be in receipt of that notice.

B. Paragraph 3 requires that notice be sent to the child and the clerk of courts for forwarding to the child's attorney and that a probable cause hearing

be held within 72 hours from the date of the child's detention. However, the proposed order does not establish if the child may be detained in the event the child's attorney is not appointed within the 72-hour period. The Opinion, however, states, "in no event shall detention of the child in the absence of a probable cause hearing exceed seventy-two (72) hours from the date of the initial detention." (Exhibit A, p. 16).

C. Paragraph 3 requires notice to be sent by, we assume, the Department of Public Welfare to the Court who, in turn, sends it to counsel for the child, and this must be accomplished within 24 hours of the child's admission. The Department cannot assure that an unknown attorney will receive notice of the child's admission 48 hours prior to the probable cause hearing and 24 hours after the juvenile was admitted; however, address has not been made, if the conditions above were met, if an attorney can adequately prepare his case within 24 hours before the hearing.

D. Paragraph 3 requires notice of the child's admission/commitment be sent to the clerk of the court with jurisdiction; however, is jurisdiction to be determined by the location of the institution or by the county from which the child came?

E. Paragraph 3 fails to provide notice to the parent, guardian, or juvenile's applicant.

F. No provision has been made for a continuance, either by the juvenile, parent, hospital, or master.

G. Paragraphs 5 through 8 and 13 require legal representation for the juvenile. The Commonwealth does not object to representation of children by attorneys; however, in light of *Edleman v. Jordan,* this proposed order compels the State to expend funds from its treasury to pay for counsel for indigent juveniles without legislative authority and appropriations. Our order suggests that the public defender or an alternative organization like community legal services which have statutory or clear grant responsibility to accept as clients all who fall within economic guidelines, be referred the cases of indigent juveniles. No standards of indigency have been set forth and a serious question arises if the parent must pay for counsel to his child. Otherwise, until the Legislature provides an alternative source of counsel for indigent juveniles involved in these types of proceedings, it would be unlawful for This Court to order the Commonwealth to pay for said attorneys.

H. Paragraph 11 designates the Commonwealth Court system as the judicial system for the probable cause and full commitment hearings. This Court is thus creating a cause of action in a separate judicial system without a present legislative or common law foundation. As of October 2, 1975, in an amended petition of writ of habeas corpus, petitioner seeks to have declared Section 408 of the Mental Health and Mental Retardation Act of 1966 unconstitutional because there is a violation of equal protection according to the procedural requirements set forth in *Bartley. In re Bingman,* Common Pleas Court of Snyder County, No. 496, 1975. It is unclear and a matter of substantial controversy whether a

Federal District Court has the authority under the Constitution of the United States or any act of Congress to exercise such direction and control over the Commonwealth's judicial branch of government and its judicial officers.

I. In paragraph 11 This Honorable Court declares that the present facilities of the Commonwealth Court system be used for these hearings and directs that the Legislature order an alternate neutral tribunal to conduct probable cause and full commitment hearings (Exhibit H, p. 4). However, This Honorable Court fails to realize that the Legislature may provide for an equally constitutional method other than by using the Commonwealth Court system, such as the use of a masters (which is prevalent in the 406 commitment process).

J. Paragraphs 13 and 15 provide the child with an opportunity to offer testimony of witnesses; however, who bears the expense for professional testimony such as psychiatric or psychological testimony? This requirement compels the State to expend funds from its treasury to pay for services which are in direct violation of *Edleman v. Jordan.*

K. Paragraph 15(E) requires the discharge, release, or recommitment of institutionalized juveniles to be accomplished within 120 days from the date of this order. This Honorable Court is without jurisdiction and without authority to order the release or conditional release of juveniles already in custody at State institutions within the context of this civil rights action. The exclusive method by which such relief may be obtained is habeas corpus. Further, pursuant to 28 U.S.C. §2254(b), exhaustion

of state remedies is a prerequisite to federal jurisdiction in habeas corpus proceedings. The presentation of a civil rights claim requires no such exhaustion; however, it is not permissible to pursue a habeas corpus remedy through a civil rights action and thus avoid the necessity of referring to the state judicial system for habeas corpus. *Preiser v. Rodriguez,* 411 U.S. 475 (1973).

L. Paragraph 15(E) requires the discharge, release, or recommitment of all juveniles within 120 days from the date of this order. As previously stated, This Court is without jurisdiction and authority to order the release or conditional release of juveniles already in custody at state institutions within the context of this civil rights action. The exclusive method by which such relief may be obtained is habeas corpus. *Preiser v. Rodriguez,* 411 U.S. 475 (1973). The Department cannot programmatically effectuate the Court's requirement to recommit all institutionalized juveniles within 120 days and will have no choice but to discharge this group which approximates 7,000 juveniles to their parents and guardians. No aftercare is provided. The effect of this requirement will cause great harm to this class, the majority of which are severely retarded. Furthermore, discharge in several instances may not occur because parents may refuse to have their child returned to them and appropriate proceedings before the local court will be needed to effectuate appointment of a guardian ad litem for the child.

M. Paragraph 15(E) requires the discharge, release, or recommitment of all juveniles within 120 days from the date of this order. As previously

stated, This Court is without jurisdiction and authority to order the release or conditional release of juveniles already in custody at state institutions within the context of this civil rights action. The exclusive method by which such relief may be obtained is habeas corpus. *Preiser v. Rodriguez,* 411 U.S. 475 (1973). It is recommended that notation of each child's condition be made upon the child's medical record and forwarded to a guardian ad litem to be appointed by This Honorable Court for the express purpose of seeking a writ of habeas corpus action for each child whom the guardian ad litem feels is inappropriately institutionalized. More than 7,000 juveniles are currently located in State mental hospitals, State schools and hospitals, private licensed facilities, etc., and the majority of these children are severely retarded thereby making them incapable of exercising any judgment regarding their commitment.

N. Paragraph 15(F) requires time limits. It is impossible to implement some or all of the requirements of This Court's proposed order within the time indicated for reporting on implementation. Legislative authority is requisite to most, if not all of the proposed procedures required by paragraph 15 of the proposed order. Since the Legislature convened only for a brief session in September and October, and does not reconvene until after the general election in November, at least 180 days from the issuance of the final order is necessary for the Legislature to authorize implementation of appropriate procedures. The Department of Public Welfare has discussed and sent to Senator Louis Coppersmith copies of the Court's Opinion and our exceptions thereto for introducing legislation.

O. An affidavit by Stanley Meyers, Deputy Secretary for Mental Retardation, setting forth the difficulties of implementing This Court's proposed order is attached as Exhibit I.

P. An affidavit by Dr. James Harris, Deputy Secretary for Mental Health and Medical Services and Commissioner of Mental Health, sets forth the difficulties of implementing This Court's proposed order and is attached as Exhibit J.

Q. The proposed order erroneously makes no provision allowing for the continuation of the "respite care" program or the intensive training program within the Mental Health/Mental Retardation program of the Commonwealth.

R. The Pennsylvania Court Administrator has informed us that he will be writing to the Court and excepting to the proposed order. He is a necessary party to these proceedings and the Commonwealth subscribes to his objections insofar as they effect the Commonwealth.

S. Paragraph 15(F) requires us to submit reports within 60 days and within 150 days a report of our progress and implementation of the proposed order. It is impossible for the reasons mentioned heretofore to accomplish the structure set forth by This Honorable Court within the time limits. Accordingly, we submit that progress reports be afforded to This Honorable Court every three months until accomplishment of the order occurs, and at that time a full report setting forth the number of children 18 years of age or younger who are committed pursuant to Sections 402 and 403 of the Act.

7. General Exceptions

A. This Court is without jurisdiction and without authority to order the release or conditional release of juveniles already in custody at State institutions within the context of this civil rights action. The *exclusive method* by which such relief may be obtained is habeas corpus. Further, pursuant to 28 U.S.C. 2254(b), exhaustion of state remedies is a prerequisite to federal jurisdiction in habeas corpus proceedings. The presentation of a civil rights claim requires no such exhaustion; however, it is not permissible to pursue a habeas corpus remedy through a civil rights action and thus avoid the necessity of referring to the state judicial system for habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Additionally, Plaintiffs never sought release of juveniles in State mental health facilities.

B. This Court's proposed order compels the State to expend funds from its treasury to pay for counsel for indigent juveniles without legislative authority and appropriations. This action is in direct violation of *Edleman v. Jordan*, 415 U.S. 651 (1974).

C. It is unclear and a matter of substantial controversy whether a Federal District Court has the authority under the Constitution of the United States or any act of Congress to exercise such discretion and control over the Commonwealth's judicial branch of government and its judicial officers. Thus, This Court, in essence, has created a cause of action in a separate judicial system without a present legislative or common law foundation. To wit, an amended petition of writ of habeas corpus has been filed in the Common Pleas Court of Snyder County, No. 496,

1975 term, in which petitioner seeks to have declared unconstitutional Section 408 of the Mental Health and Mental Retardation Act of 1966 because there is a violation of equal protection according to the procedural requirements set forth in *Bartley. In re Bingaman.*

D. While there may have been evils within existing State laws, it is case legend that the protection afforded is a matter for legislative judgment. Consequently, it would be improper to have a permanent order substitute for legislative judgment *Gunn v. University Committee to End The War In Vietnam,* 399 U.S. 383 (1970); *Robinson v. Cahill,* 62 N.J. 473, 520, 521, 303 A. 2d 273, 298 (1973); *Federal Power Commission v. National Gas Pipeline Company,* 315 U.S. 575, 599, 601 (1942); *Marbury v. Madison,* 2 L. Ed 60.

Respectfully submitted,

(s) Barry A. Roth
Barry A. Roth
Assistant Attorney General
Paul J. Carey, Jr.
General Counsel
Robert P. Kane
Attorney General

323 Health and Welfare Building
Harrisburg, Pennsylvania 17120
(717) 787-6398
October 17, 1975

FINAL ORDER—NOVEMBER 17, 1975

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley, et al.

vs.

Jack B. Kremens, Individually and as Hospital Director of Haverford State Hospital, et al.

ORDER

Before Honorable John J. Gibbons, Circuit Judge, and Honorable Daniel H. Huyett, 3rd, and Honorable Raymond J. Broderick, District Judges

---

HUYETT, J. November 17, 1975:

On July 24, 1975, we filed our opinion and order in this action granting judgment in favor of plaintiffs and against defendants. Pursuant to Fed. R. Civ. P. 58 and 65 (d), we now enter the following Order to provide and implement the declaratory and injunctive relief to which we held plaintiffs entitled in our opinion.

CLASS ACTION

1. This action is properly maintained as a class action under Fed. R. Civ. P. 23(b) (2). The class represented by the named plaintiffs includes all children eighteen years of age or younger who have been, are, or may be admitted or committed to mental health or mental retardation facilities in Pennsylvania under the Pennsylvania Mental Health and Mental Retardation Act of 1966. 50 P.S. §§4402 and 4403 (§§402 and 403).

DECLARATORY JUDGMENT

2. Section 402(a) (2), section 402(c), except for the language "any person voluntarily admitted shall be free to withdraw at any time," and section 403(a) (2) of the Pennsylvania Mental Health and Mental Retardation Act (Act) are declared to be unconstitutional on their face and as applied under the due process clause of the Fourteenth Amendment to the United States Constitution.

Notice

3. These sections of the Act are declared invalid in that they fail to require that children eighteen years of age or younger receive prior written notice of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the child's attorney must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the legislature establishes some other procedure consonant with our opinion and order, it is declared that this notice must be sent not only to the child but also the Clerk of the Court with jurisdiction to be forwarded to the child's attorney.

Counsel

4. These sections of the Act are declared invalid in that they fail to require during all significant stages of the commitment process counsel for children eighteen years of age or younger and, if the child is indigent, appointment of free counsel.

Presence of Child

5. These sections of the Act are declared invalid in that they fail to afford to children eighteen years of age or younger subject to commitment hearings the rights to presence with counsel, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and the opportunity to offer the testimony of witnesses and other evidence on their own behalf.

Standard of Proof

6. These sections of the Act are declared invalid in that they fail to require that the fact finder in a full hearing on the commitment of a child eighteen years of age or younger find by clear and convincing proof that the child is in need of institutionalization.

Probable Cause Hearing

7. These sections of the Act are declared invalid in that they permit detention of children eighteen years of age or younger for more than seventy-two (72) hours without a hearing to test whether there is probable cause to believe institutionalization is necessary. These sections of the Act are further declared invalid in that they fail to provide at a probable cause hearing the rights delineated in paragraphs 3 through 5 above.

Full Commitment Hearing

8. These sections of the Act are declared invalid in that in the event the initial hearing determines the existence of probable cause, they fail to afford to children eighteen years of age or younger a full hearing on the need for commitment within two weeks from the date of initial detention. These sections of the Act are further declared invalid in that they fail to provide at a full commitment hearing the rights delineated in paragraphs 3 through 6 above.

Regulations

9. The regulations promulgated by defendant Wohlgemuth to supplement these sections of the Act, published at 3 Pa. Bull. 1840, are declared invalid and in violation of the due process clause of the Fourteenth Amendment to the United States Constitution in that they fail to require for all children eighteen years of age or younger the rights delineated in paragraphs 3 through 8 above.

Admissions and Commitments of Plaintiffs

10. It is declared that all children eighteen years of age or younger admitted or committed to mental health or mental retardation facilities in Pennsylvania under these sections of the Act are unconstitutionally held and detained.

Use of State Courts

11. Until the legislature establishes in accord with our opinion and order an alternate neutral tribunal to conduct the probable cause and full commitment hearings, it is declared that the present facilities of the Commonwealth court system be used for these hearings.

Application for Treatment of Juveniles

12. It is declared that a parent, guardian, or person standing in loco parentis may initiate the temporary detention of a child eighteen years of age or younger in a mental health or mental retardation facility if the procedures and requirements of our opinion and order are fully complied with.

Requirements for Commitment

13. It is declared that all children eighteen years of age or younger who have been, are, or may be subject to admission or commission to a mental health or mental retardation facility in Pennsylvania are entitled to:

Notice

A. Prior written notice of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the child's attorney must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the legislature establishes some other procedure consonant with our opinion and order, this notice must be sent not only to the child but also to the Clerk of the Court with jurisdiction to be forwarded to the child's attorney.

Counsel

B. Counsel during all significant stages of the commitment process and, if the child is indigent, appointment of free counsel.

Presence of Child and Other Hearing Rights

C. Presence of the child at all commitment hearings, an opportunity to be heard, confrontation

and cross-examination of adverse witnesses, and an opportunity to offer testimony of witnesses and other evidence on the child's behalf.

Standard of Proof

D. A finding by clear and convincing proof at the full commitment hearing that the child is in need of institutionalization.

Probable Cause Hearing

E. A hearing within seventy-two (72) hours from the date of the initial detention to test whether or not there is probable cause to believe that institutionalization is necessary.

Full Commitment Hearing

F. A full commitment hearing within two (2) weeks from the date of the initial detention.

Waiver

14. Excepting the rights to notice and counsel, any or all of the rights delineated in paragraph 13 may be waived by the child, and the neutral tribunal may accept such a waiver upon approval by the child's counsel and upon a finding that the child understands his rights and is competent to waive them. Because there may be situations where the child either does not understand his rights or is not competent to waive them, any or all of these rights, excepting notice and counsel, may also be waived by the child's attorney, and the neutral tribunal may accept the waiver upon a finding that the waiver is appropriate.

INJUNCTIVE RELIEF

15. It is ordered that the operation of section 402 (a) (2), section 402 (c), except for the language "any person voluntarily admitted shall be free to withdraw at any time," and section 403 (a) (2) of the Pennsylvania Mental Health and Mental Retardation Act (Act) is enjoined in that these sections of the Act are unconstitutional on their face and as applied under the due process clause of the Fourteenth Amendment to the United States Constitution. It is further ordered that the defendants and their officers, agents, servants, employees, successors, and those persons in active concert or participation with them are enjoined:

Procedures

A. To refrain from accepting or continuing the admission or commitment of any child eighteen years of age or younger under the Act to any mental health or mental retardation facility unless the child is or has been provided:

(1) Prior written notice of the date, time, and place of both the probable cause and full commitment hearings and a statement of the grounds for the proposed commitment; the child's attorney must be in receipt of notice at least forty-eight (48) hours prior to the initial hearing. Until the legislature establishes some other procedure consonant with our opinion and order, this notice must be sent not only to the child but also to the Clerk of the Court with jurisdiction to be forwarded to the child's attorney.

(2) Counsel during all significant stages of the commitment process and, if the child is indigent, appointment of free counsel.

(3) Presence of the child at all commitment hearings, an opportunity to be heard, confrontation and cross-examination of adverse witnesses, and an opportunity to offer testimony of witnesses and other evidence on the child's behalf.

(4) A finding by clear and convincing proof at the full commitment hearing that the child is in need of institutionalization.

(5) A hearing within seventy-two (72) hours from the date of the initial detention to test whether or not there is probable cause to believe that institutionalization is necessary.

(6) A full commitment hearing within two (2) weeks from the date of the initial detention.

Excepting the rights to notice and counsel, any or all of the rights delineated in paragraph 15(A) may be waived by the child, and the neutral tribunal may accept such a waiver upon approval by the child's counsel and upon a finding that the child understands his rights and is competent to waive them. Because there may be situations where the child either does not understand his rights or is not competent to waive them, any or all of these rights, excepting notice and counsel, may also be waived by the child's attorney, and the neutral tribunal may accept the waiver upon a finding that the waiver is appropriate.

Regulations

B. To promulgate and issue regulations and to publish them, within thirty (30) days as immediately effective, requiring that all mental health and mental retardation facilities in Pennsylvania (*see* 50 P.S. §4102 for the definition of "facility") adhere to the opinion and order in this action.

Notice of Order

C. To give notice forthwith to all state school and mental hospital directors and their delegates and all directors of all other mental health and mental retardation facilities in Pennsylvania of the opinion and order in this action. Further, to give notice forthwith to all judges of the Courts of Common Pleas in Pennsylvania of the opinion and order in this action.

Access for Attorneys

D. To provide to attorneys access to the grounds and facilities of all mental hospitals and institutions, to their individual clients, and to the institutional and hospital records pertaining to their clients' commitments.

Procedures for Children Already Admitted or Committed

E. To initiate procedures, commencing immediately, to assure that all children eighteen years of age or younger already admitted or committed pursuant to §§402 and 403 are either discharged or released or recommitted according to the procedures required by our opinion and order. Such discharge, release, or recommitment shall begin immediately and shall be concluded within one hundred and twenty (120) days of the date of this order, unless an extention is granted by this Court for good cause shown. Notation shall be made upon the medical records of such children that their discharge, release, or recommitment was effected pursuant to the opinion and order in this action. In addition, any person admitted or committed pursuant to §§402 or 403 at a time when he or she was eighteen years of age or younger but who has reached his or her nineteenth birthday shall be brought before a Commonwealth court or alternate neutral tribunal and in-

formed of his or her options under §§402 and 403 for voluntary withdrawal. Should such person choose to withdraw voluntarily, he or she shall be released immediately unless proper procedures are initiated pursuant to the appropriate Pennsylvania statutes governing the involuntary commitment of adults.

Reports on Implementation

F. To report to this Court within sixty (60) days and again within one hundred and fifty (150) days on the steps taken and progress made in the implementation of our opinion and order. The one hundred and fifty-day report shall describe, for each mental health or mental retardation facility, the number of children eighteen years of age or younger released, discharged or recommitted and the number of persons who have reached their nineteenth birthday but who were eighteen years of age or younger at the time they were admitted or committed pursuant to §402 or §403 who have been released, voluntarily admitted or committed, or involuntarily committed.

(s) John J. Gibbons
C.J.
(s) Daniel A. Huyett 3rd,
D.J.
(s) R. J. Broderick
D.J.

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-2272

Kevin Bartley; Steve Gentile; Leslie Levine; Vicki Mathews; Mark Weand; minors, through their next friend, individually and on behalf of all others similarly situated,
Plaintiffs

v.

Jack B. Kremens, individually and as Hospital Director of Haverford State Hospital; Helene Wohlgemuth, individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; William B. Beach, Jr., individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,
Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jack B. Kremens, et al., the Defendants above-named, hereby appeal to the Supreme Court of the United States from the final order

granting a permanent injunction in favor of Plaintiffs and against Defendants, entered in this action on November 17, 1975.

This appeal is taken pursuant to 28 U.S.C. §1253.

(s) Barry A. Roth
Barry A. Roth
Assistant Attorney General
Counsel for Defendants

[Caption Omitted]

AFFIDAVIT OF SERVICE

Barry A. Roth certifies that he, by certified mail, return receipt requested, served:

David Ferleger, Esq.
1427 Walnut Street
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John Gabroy, Esq.
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Philadelphia, Pa. 19103

Thomas B. Harvey, Jr.
American Civil Liberties Foundation
260 South 15th Street
Philadelphia, Pa. 19102

Jay Stanley Pottinger
Assistant U. S. Attorney General
Department of Justice
Washington, D.C. 20530

Robert C. Burgdorf
National Association for Retarded Citizens
1235 North Eddy Street
South Bend, Indiana 46617

Peter Sandman
Youth Law Center of California
795 Turk Street
San Francisco, California 94102

by sending them a copy of the Notice of Appeal at the above address.

Barry A. Roth
Barry A. Roth
Assistant Attorney General

Dated:

Sworn to and subscribed before me on this 24th day of November, 1975.

(Illegible)
Notary Public